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AMERICAN COMMERCIAL LAW SERIES
VOLUME IV

THE LAW OF AGENCY
AND
THE LAW OF PARTNERSHIP

WITH

QUESTIONS, PROBLEMS AND FORMS

By ALFRED W. BAYS, B. S., LL. B.

MEMBER OF CHICAGO BAR AND PROFESSOR OF COMMERCIAL LAW, NORTHWESTERN UNIVERSITY SCHOOL OF COMMERCE

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THIS SERIES OF BOOKS
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DEAN OF NORTHWESTERN UNIVERSITY
SCHOOL OF COMMERCE
WHOSE ZEAL IN THE CAUSE OF COMMERCIAL
EDUCATION HAS BEEN A CONSTANT SOURCE OF
INSPIRATION TO THE AUTHOR

PREFACE TO THIS VOLUME.

The Law of Principal and Agent, and the Law of Partnership are treated in this volume. The importance of these subjects to the business man is apparent. The law governing agency grows more and more important as industry and commerce develop; and the law governing partnership, while perhaps restricted in its application by the formation of corporations, is, and doubtless will continue to be, of great practical importance.

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THE LAW OF AGENCY

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BOOK I.

THE LAW OF AGENCY

THE LAW OF AGENCY

PART I.

NATURE AND FORMATION OF THE RELATIONSHIP OF PRINCIPAL AND AGENT.

CHAPTER 1.

NATURE OF THE RELATIONSHIP.

Sec. 1. DEFINITION OF AGENT. An agent is one who has placed his services at the disposal of another, called the principal, for the purpose of representing that other in the formation of contractual relationships with third persons.

The law permits one to act in person or through a representative. If one chooses he may purchase the services of another so that those services become his own as though he had performed them himself. He orders the thought of that other, he controls his actions, and the law therefore holds him responsible. It identifies him with this other whose services he has made his own. Thus if A owns, say, a newspaper, he needs the services of many persons to successfully conduct it. It is a physical impossibility for him to care for the multitude of detail involved in its management. He needs those who secure and publish the news, operate the type machines, obtain subscribers, keep books, collect money due, obtain contracts with advertisers; and in legal theory if he does these things through others he is to be con-

sidered as having done them himself and to be responsible for results.

And yet one may work for me who is not my agent or servant, provided he does not put his *services* at my disposal. There is the criterion. If one contracts with me for the *result* of his services, and remains in legal control of the services themselves he is no more my agent or servant than I am his. We are simply contractors together. Thus, if A in the above case should contract with B to supply him with a printing press, B would not be A's agent or servant. He would in no way *represent* him. The distinction, then, is obvious. An agent or servant must be one who makes his services those of another so that during the performance of those services, his identity becomes merged with that other and we can truly say, in legal theory as in fact, that A is doing certain work although it may be by B's hand that he does it and though in fact but for B's knowledge and skill he could not do it.

A maxim applicable to the law of agency reads as follows: *"Qui facit per alium, facit per se"*—he, himself, acts, who acts through another. Another maxim is: *"Respondeat superior"*—let the principal or master answer. In the law of agency, the most important phases are that when an act is done, it is the person's act who employed the other to do it. That person is constructively present doing the act. Therefore it is that person who is held for its consequences.

The subject of the Law of Agency has become a highly important one. This is an age of extensive commercial organization and activity. It is highly important therefore, that we understand the duties

of a principal to his agent, the duties of the agent to his principal, the rights of third persons derived through the agency, and all the phases of the subject.

SEC. 2. HOW AGENT DIFFERS FROM SERVANT. An agent is one appointed to represent another to bind him contractually; a servant is one to whom work is delegated without authority to affect the contractual rights and duties of the person employing him.

An agent's service requires that he shall bind the principal in respect to the principal's contracts. In some way he affects the contractual relationships of his principal. He may be appointed to make an entirely new contract, or he may simply be employed as a collector of amounts due on contracts which were made without his intervention or service. A servant on the other hand is employed to do work which does not change the contractual relationship of the principal. It may, indeed, be work necessary to carry out some contract; but there is no authority in the servant to enter into contracts or modify or discontinue contracts. So the work of the servant may be of a very high nature or of a very unskilled sort.

A person may be at one moment an agent and at another a servant. If his chief business is to be agent, he may have incidentally many acts to perform which are the acts of a servant. Employed to act as general agent of a small store, he may also be required to keep it in order. Thus we see that the agent differs from the servant incidentally rather than radically. Yet the subject of agency is more important than the subject of Master and Servant, because it so greatly involves the rights and duties of third persons. In the law of Agency we shall

have to consider the relationship as between the parties; but also a perhaps even more important phase, the rights of third persons growing out of the relationship.

Sec. 3. HOW AGENT DIFFERS FROM "INDEPENDENT CONTRACTOR." An "independent contractor" is one with whom a person contracts to bring about some result, using his own means, adopting his own agencies, and not acting as the representative of the person employing him.

We have already seen how an agent is one who sells his services, and we have noticed that one may have a contract with another and still not be that other's representative. Such a one is an "independent contractor." Suppose that P has a country place on which there is a roadbed which needs repairing. P may contract with A to put that road in a certain condition, leaving it to A to bring about the result as he sees fit. He has no control over A's services. A is alone responsible for a certain result in a certain time. He may employ whomever he chooses, pay what wages he will, put in what time he desires. He cannot bind P upon any contract. If he employs servants, they are his servants, not P's. If he buys material, he must pay for such material, he cannot bind P. He has no more right to represent P, and is no more P's agent, than, for instance, is P's tailor who contracts to make P a suit of clothes. Now P might have said to A, "I have a road which needs repair. I will give you two dollars a day for working upon it." In that case A, upon acceptance, would be P's servant. Or if P had said to A, "Get me a man to fix my road bed," and A had accepted this proposition, A would be P's agent, and P would

be bound by the contract made with the man, A would not be bound, and the man secured would become P's servant.

Sec. 4. CLASSIFICATION OF AGENCIES. Agencies may be classified from the standpoint of the extent of the authority, of the nature of the undertaking, or of the skill and specialization involved.

(1) Classification in respect to extent of authority —general and special agencies.

A general agent is employed to represent another generally in some line of business, as to conduct a store, manage an office, etc. A special agent is appointed to do some special thing as to sell a horse, to collect a note, etc. The importance of the distinction lies in the fact that a general agent has much apparent authority, while a special agent has only the authority actually given him as we shall note more in detail later.

(2) Classification in respect to nature of the undertaking—agencies del credere and not del credere.

Usually, the agent is not liable on the contracts he makes, either to the third person or to the principal. His duty goes no further than to obtain the contract between the parties. With the performance of that contract he has no concern. Certainly he is not liable for its breach. Thus P employs A to sell goods to C on 90 days credit. A makes the sale. C does not pay and being insolvent, cannot be made to pay. A is not liable. This is the usual agency and A is not a *del credere* agent.

Suppose A undertakes for an added consideration to insure the payment of all debts arising out of his agency. He is then an agent ***del credere***. He can

be sued if the third party fails to pay. That was his special contract. It is not necessary for the principal first to pursue the debtor. He may proceed at once on the maturity of the debt against the *del credere* agent.

The *del credere* agent's contract is not within the statute of frauds which requires promises to answer for another's debt to be in writing. The agent's promise to answer for another's debt is only incidental. His undertaking is original, and it is no objection that it is not in writing.

(3) Classification in respect to skill and specialization.

Agents may be divided into professional and non-professional agents. We will notice the various kinds of professional agents later, when we consider the authority of agents. The chief classes of professional or specializing agents are: brokers, factors, and auctioneers.

A *broker* is an agent employed to bring parties together to enter into a contract. He acts in the name of his principal and does not usually have possession of the subject matter of the contract.

A *factor, or commission merchant* takes possession of goods and sells them. He often acts in his own name and he has more extensive powers than a broker.

An *auctioneer* sells goods in public sale to the best bidder. He is the agent of the owner. But when he accepts a bid he is the purchaser's agent for the purpose of entering the sale on his books and signing the purchaser's name.

We will notice these special agencies more at length later.

CHAPTER 2.

WHO MAY BE PRINCIPAL AND AGENT.

Sec. 5. IN GENERAL. The general rule is that what one may do himself, he may appoint an agent to do; and anyone may be an agent if he has the intelligence to do the act required of him as agent.

What one may do in person he may usually do by proxy if he is of full legal age and where only his private interests are concerned. Some acts he may not delegate, as the law on grounds of public policy forbids it, as, the right to vote at a public election; and some acts he may not delegate because he has a duty imposed on him by contract to give them his personal attention. We may consider a few persons who have a certain incapacity to contract and find that this affects them in the appointment of agents or in acting as agents.

Sec. 6. MINORS. A minor's appointment of an agent is voidable by him, and in some states, it is denied that he may appoint an agent. Whatever contract in any case an agent made for him it would be voidable where the minor might avoid it if made personally. A minor may act as agent, and bind his principal and the third person by contract, but he himself may avoid the agency at any time.

If a minor appoints an agent he may certainly avoid the contract of agency at any time. So he may avoid the contract which the agent makes for him. But by the rule in the earlier cases and now in some states, an infant has not even a voidable power to

appoint an agent. The act is void and confers no authority.[1]

But an infant may act as agent if he have sufficient intelligence to do the required act. He may indeed at any time withdraw from the relationship. But so long as he does act, the principal and third person cannot complain. Thus P appoints A, a lad of 12 years, to go to C and contract with C for the sale of certain horse. Here A acts merely as a carrier whereby the minds of the parties travel and meet. P could not afterward withdraw from the contract because the agent he had himself appointed was not of legal age. Nor would C have any reason to complain. A valid contract would have been made between P and C.

Sec. 7. INSANE PERSONS. An insane person's appointment of an agent is voidable or void. He may act as agent, if he have sufficient intelligence to carry out the act, but could at any time avoid the relationship.

If a person is insane, he or his conservator may avoid the appointment of agent which he has made. In some states by statute, this act would be absolutely void where by legal proceedings he had been declared insane and a conservator appointed. His capacity to be agent would be governed by much the same principles as were stated above in case of minors.

Sec. 8. CORPORATIONS. A corporation can appoint the agents which it needs or finds reasonably convenient for the purpose of carrying out its implied powers. It may also act as agent when that is within the scope of its corporate powers and purposes.

1. Cole v. Pennoyer, 14 Illinois Reports, 158.

A corporation must act by agent or servant. The extent to which it may give an agent authority is governed by its charter powers. A corporation could not appoint agents for purposes which it has neither express nor implied power to carry out.

Its power to act as agent is governed also by reference to its charter powers.

The general rule that a corporation is a creature of restricted capacity, as determined by its charter, and can only do those things for which it was created, governs its power to appoint and act as agent. See The Law of Private Business Corporations, volume 5 of this series for general discussion of powers of a corporation.

Sec. 9. PARTNERS AND PARTNERSHIPS. A partnership's capacity to act as principal or agent is determined by the authority to that end which the members confer upon it. As a general rule each individual partner is agent of the other partners for those acts which come within the scope of the partnership purposes.

Whatever one may lawfully do by himself in the way of trade, he may usually do in association with others. The power of the partnership to act as agent, or appoint agents, depends, therefore, upon the will of its members.

The partner is the agent of the other partners. He has a very large apparent general authority to do everything reasonable to carry out the objects for which the firm is organized and existing. He is a co-owner of the business and third persons may therefore presume that he had that large general authority which a co-owner of a business usually has. He may buy and sell the articles usually dealt in by the firm,

give and take credit, sign negotiable instruments, employ such agents as the nature and extent of the business seems reasonably to warrant, and by all these acts the other partners are bound, whether there was actual authority to do the act or not.

We may say, therefore, that a partnership may act as agent or as principal according to the will of its members, and that a partner may bind it as a principal or agent according to his apparent authority as determined by the scope and nature of the particular partnership business. See The Law of Partnership in this volume.

Sec. 10. UNINCORPORATED CLUBS, SOCIETIES, ETC. A club, society, etc., unincorporated, may act as principal or agent according to the will of its members. The members of such club, society, etc., are not its agents or the agents of the other members by reason of such membership, but the authority of the member to bind the other members or some of them must be proved by showing such members' express or implied authorization or assent.

An unincorporated club, or society, differs essentially from a partnership. A partnership is and must be for purposes of profit, while the club or society we now consider is for purposes of amusement, education, charity, and the like. We have noted that impliedly each partner is the agent of the partnership and may bind each partner within the scope of the partnership business by very reason of his membership in the firm. But this is not true of a club or society. No member can bind any other member thereof unless he has received special authority. This authority may be conferred by by-laws to which each member assents by becoming a member, or it

may consist in a vote given, or in an assent to what is being done or a ratification of what has been done. In many cases a member of a club or a committee of several persons binds himself or themselves personally for the debts he or they contract.

CHAPTER 3.

THE APPOINTMENT OF THE AGENT.

A. Authorization by Act of Party.

(a) *The formalities required.*

Sec. 11. IN GENERAL. Generally speaking, and subject to the exceptions hereafter stated, the authority conferred upon an agent may be without any particular formality.

Authority may be conferred upon an agent orally or in writing. Or it may be implied, though this is not usual. In certain cases, however, statutes require written proof of the appointment to make it enforceable. And so the nature of the contract to be made by them may require that the appointment be formal in nature. These cases are treated in the following sections.

Sec. 12. REQUIREMENTS OF THE STATUTE OF FRAUDS. By the statute of frauds as enacted in some states, certain agencies, notably, the agency to contract for the sale of real estate, are not enforceable unless in writing.

The original English statute of frauds required that a contract for the sale of real estate should be in writing; but if that contract was made through an agent and by him duly reduced to writing, that was a sufficient compliance; *his authority* did not have to be in writing. But many modern statutes have made

this an added requirement, and the appointment of the agent must be in writing.

So special statutes may require various agencies to be in writing.

Sec. 13. FORMAL AUTHORITY REQUIRED TO EXECUTE FORMAL CONTRACT. Authority to execute a written contract may be conferred orally or in writing; but authority to execute an instrument under seal must be under seal. Statutory provisions not considered.

Contracts are divided, from the standpoint of dignity, into formal contracts, or such as derive their validity from the fact that they are under seal; and simple contracts, or contracts by parol, or such as derive their validity from consideration. These latter are either written or oral contracts, both of equal dignity. It is said that authority to execute a contract must be of equal dignity with the contract to be executed. It follows that authority to execute an oral or a written (but unsealed) contract may be either oral or in writing; but a contract to execute a sealed instrument must be under seal. This ignores possible statutory provisions which may require (as noted above) certain agencies to be in writing or which may do away with the ancient and perhaps undeserved dignity of the sealed instrument.

If an instrument does not by the law or by the authorization of the principal, require a seal, and the agent affixes a seal, that may be ignored as a superfluity, and the contract will be treated as one not under seal.

Where the appointment is drawn up formally, under seal, it is said to be a *power of attorney.*

(b) *Elements essential.*

Sec. 14. IN GENERAL. To establish the relationship by contract, all the elements essential to formation of contract must exist, but agency may also result from a gratuitous appointment.

Agency may arise out of contract, and this is the usual case. In that case there must be all the elements which are essential to the formation of any contract, namely, competent parties to contract, offer and acceptance, legality of object, and either a consideration or a seal. We need not here dwell to any extent on a consideration of these elements, as that belongs rather to a treatment of contracts in general.

The relationship, however, need not be contractual. It may be purely gratuitous. I may confer authority upon one to step across the street and buy a book for me. There is no contract, because there is no consideration. My friend buys the book as a favor to me, and without expectation of reward or right to claim compensation. In such a case, the third party with whom the agent makes the contract is not concerned with the contractual rights between me and my agent. All that concerns him is the authority with which the agent is clothed, and if that sufficiently appears, that is all that is necessary. It cannot concern him what I pay the agent, or whether I pay him anything. I may, however, revoke the authority before the agent has acted, or he may change his mind and refuse to act. He would, however, have to act in good faith, that is to say, give me sufficient notice that he was about to withdraw, or had withdrawn, to allow me to protect my interests.

Sec. 15. LEGALITY OF OBJECT. The object of the appointment of the agent must not be illegal or opposed to public policy.

We find a rule in the law of contracts, and may consider briefly its application here, that a contract must not be illegal or opposed to the public policy. If that is the fact, the Court will not assist either party in carrying out the contract. For example, all appointments which have for their purpose the improper influencing of legislators to have a law passed, or defeated, are void. The failure on the part of the agent to carry out his agreement could not subject him to any liability on account of breach, and his performance of the contract could not entitle him to any compensation.[2] These agreements are called lobbying agreements and exist wherever there is an intention manifested to bring about unfair methods of influence, whereby a law is to be enacted or its enactment hindered. But it is not illegal to appoint an agent to go before the committees of a legislature, openly, and present some side of the subject.

So any agency created for the purpose of defeating the proper administration of justice would be illegal and unenforceable. Any appointment created to improperly influence the action of jurors or judges or other court officials would be void.

The contract whereby one is appointed a marriage broker is void, as it tends to promote ill-considered marriages.[3]

2. Mills v. Mills, 40 New York Reports, 543.

3. Hellen v. Anderson, 83 Illinois Appellate Reports, 506. The court said: "The pernicious tendency of such

These are illustrations of the general subject which is treated more at length in books upon the law of contracts. The general rule is plain and its application not usually difficult. The phase of the subject should be noted, that if the appointment *tends* to promote illegality, or tempts one to an illegal action, it is void. The Courts will not consider whether in the particular instance good came of it. Thus in a lobbying agreement, the actual result might have been beneficial to the public at large. That would be merely accidental. Public policy requires the discouragement of such agreements.

B. Authorization Conferred by the General Law.

Sec. 16. AUTHORITY OF WIFE TO BIND HUSBAND. A wife is given by law the authority to bind her husband for necessaries, where she is not, in her own fault, living apart from him, and the husband is not actually supplying her.

A husband is bound to supply his wife with necessaries and if he does not provide her, she has authority to bind him in the purchase of such necessaries. And this authority he cannot revoke, unless she is living apart from him on account of her own fault. If she is actually supplied, then, of course, she cannot bind the husband. Accordingly a merchant who supplies a wife goods on the credit of her husband, must take the risk that she is not already being supplied with her needs, unless he relies on an implied authority of the wife to bind the husband, growing

contracts is so great that enforcement of them by the courts will be refused regardless of the propriety or expediency of the particular marriage."

out of the special circumstances. For there may be quite an extensive authority on the part of the wife to bind the husband, quite apart from this authority conferred by law, growing out of each case, as where the husband as a practice permits the wife to trade in his name, and that is her custom. That authority he may at any time revoke. But the authority to bind him for her necessaries which he is not supplying cannot be revoked. If he absents himself from her, the authority to bind him still continues.

What constitutes a necessary depends on circumstances. The station in life is to be considered. Yet a thing is not a necessary except it have reference to actual needs, as food, clothes, fuel, lodging, medicine, etc.

Sec. 17. AUTHORITY OF CHILD TO BIND PARENT. The law confers no authority upon the child to bind the parent. But authority to bind the parent may be implied from the circumstances.

The law does not confer authority on the child to bind the parent, though under the circumstances of any particular case that authority might be readily inferred.[3a] In fact from very slight circumstances the courts will find an authority for the child to bind the parent for his necessaries.

3a. Hunt v. Thompson, 3 Scammon (Ill.), 179.

CHAPTER 4.

AUTHORIZATION BY RATIFICATION.

A. Definition and Essentials.

Sec. 18. MEANING OF RATIFICATION. If one acts in the name of another as his principal, and yet without any authority, the principal may choose to stand by the act so done in his behalf. This is known as ratification.

Ratification results in conferring authority with retroactive effect. Ordinarily in the creation of an agency P. says to A., "I hereby authorize you to do such and such an act," and A. goes forth and does it. But suppose A. mistakenly presumes he has authority to bind P. when he has none, either actual or apparent. C. takes A.'s word for it that he has authority and assents to the act whereby A. has presumed to bind P. P., afterwards learning of this may grant the authority and *ratify* A.'s act. Such act of ratification may be likened to curative legislation which relates back and cures a defect in some former act done by a municipality, as an issue of bonds in excess of authority. So a principal can cure the lack of authority in his agent.

It is necessary, however, that certain things be true in respect to the transaction. These we will now notice.

Sec. 19. AGENT MUST NOT HAVE ACTED AS PRINCIPAL. The act must have been done upon behalf of him who ratifies. An undisclosed principal cannot ratify.

There can be no ratification unless the agent acted as an *agent* with the apparent effect of binding his principal. Thus, if A., not being authorized by P., in his own name contracts to buy goods of C., P. cannot afterward assert himself as a party to the contract without consent of all parties concerned. But if A. acted without authority from P., yet in P.'s name as principal, P. may come forward and take the benefit of A.'s contract as though there had been authority on A.'s part to make it and C. will be bound to treat P. as a party to the contract. This is no injury to or hardship upon C., for ratification of A.'s act simply brings matters to the condition in which C. supposed they actually were when the contract was made, and because of which he made the contract.

Thus suppose that A. informs C. that he has authority from P. to buy 100 bushels of wheat. A. is mistaken and there is in fact no authority from P. to make any such contract. Neither is there any *apparent* authority to do the act whereby P. would be estopped to set up the lack of A.'s authority. But C. takes A.'s word for the fact and promises A. to sell P. 100 bushels of wheat. Here P. may repudiate the entire transaction. There is neither real nor apparent authority whereby A. can bind him. He chooses, however, to have the contract stand as made. He *ratifies* the act. Thereupon both C. and P. are bound and all the consequences arise which would have arisen had A. been previously authorized. If P. sues upon the contract, C. cannot set up the lack of authority; if C. sues P., he may hold P. by showing the ratification.

Sec. 20. ACT RATIFIED MUST BE ONE THAT COULD HAVE BEEN AUTHORIZED. As a general rule we may say that an act cannot be ratified which could not have been authorized by that principal.

What one cannot authorize he cannot ratify. Thus all those agencies which would be void because illegal, are agencies that cannot arise by ratification. And yet where the agency itself is legal, wrongful acts growing out of its performance may be ratified. Thus one who ratifies an agency, becomes responsible for the torts committed by the agent.

It is held in most jurisdictions that a forgery can be ratified in the sense that the party whose name is forged can by his subsequent action in adopting the signature be estopped to deny it is his signature or to deny that he will be bound upon it.

Sec. 21. RATIFIER MUST BE IN EXISTENCE WHEN THE CONTRACT IS MADE. A party subsequently coming into existence cannot ratify, yet he may become liable by adopting the contract.

It is laid down in the text books that a party must be in existence at the time the agent acts in his behalf in order to ratify. Thus a corporation cannot ratify acts made in its name before its creation. Yet this rule is to a large extent deprived of its force by the rule that such a party may *adopt* the act of its agent, and there is not much reason in most of the cases in distinguishing between ratification and adoption.

Sec. 22. RATIFIER MUST BE FULLY INFORMED. A person will not be held upon a ratification where he is in ignorance of any material fact; unless he desires

and shows by his conduct or words that he is willing to be bound whatever the fact may be.

The law does not hold one as principal by ratification who is in ignorance of any of the material facts, except where it appears that he is willing to be bound whatever the facts may be. When it is set up that one has by his conduct become bound it must usually be shown that he was aware of all the material items going to make up the transaction or that he was willing to take the benefit of the act regardless of what all of the facts might be.

Sec. 23. RATIFICATION MUST BE OF WHOLE ACT. The ratification must go to the whole act. One cannot ratify a part and reject the rest of an act done in his behalf.

If one desires to accept and ratify an act done by an agent in his behalf he cannot separate the act into parts and take those which please him and reject those which do not. If he ratifies at all, he must ratify the whole act. Thus, suppose that A. in P.'s name, but without authority, makes a contract with C. There are certain terms in it that are to P.'s liking, but other terms that he does not care to assent to. He must either accept the contract as a whole or reject it. If he accepts and retains the benefits of the contract knowing all the facts, he will be held to ratify the whole contract. Otherwise, P. could put a contract on C. which C. would never have made.[4] So if the act as done involved a tort, a ratification of the act is a ratification of the tort.

Sec. 24. RATIFICATION MUST BE IN FORM REQUIRED FOR PREVIOUS AUTHORIZATION. If cer-

4. Eberts v. Selover, 44 Michigan Reports, 519.

tain formalities are required by law in the authorization of the agent, the ratification must likewise have those formalities.

If the law requires that a particular agency be in writing, the ratification as well as previous authorization must be in writing.[5] So if the law requires the appointment to be under seal, a ratification must be under seal. If an agent, however, makes a contract under seal which the law does not require to be under seal the seal may be ignored as a superfluity and ratification may be parol.

Sec. 25. RATIFICATION MUST BE BEFORE THE OTHER PARTY'S WITHDRAWAL. There can be no ratification of the agent's act if the other party withdraws before the ratification takes place.

If P. has not authorized A. to represent him in the contract which A. makes on P.'s behalf with C., then we have seen, P. is not bound upon the contract unless he chooses by ratification to supply the defect in the authority. It is obvious that if we give P. this right to be bound or not bound, as he chooses, we must accord the same right to C. It would be an anomaly to say that C. was bound while P. was not bound. C., therefore, may upon learning A.'s lack of authority, withdraw from the contract, just the same as one may make an offer and then with-

5. Kozel v. Dearlove, 144 Illinois Reports, 23. (Illinois statute of frauds requires agency to sell real estate to be in writing. Held, in this case that whether the authority is given antecedently or by ratification, it must be in writing).

draw from it before acceptance. We say, therefore, that ratification cannot take place if the other party withdraws before the ratification occurs.

B. What Constitutes Ratification.

Sec. 26. EXPRESS RATIFICATION. Express ratification consists in supplying the lack of authority by writing or orally.

Ratification may be expressly made. The principal might ratify by express statement in order to supply the original defect, or because he did not care to insist on the lack of authority.

Ratification, however, is in most cases a fact to be discerned from the circumstances. We will now inquire what conduct constitutes ratification.

Sec. 27. SILENCE AS RATIFICATION. If an agent exceeds his authority, the principal on discovering the facts must promptly repudiate the act if he would not be bound, but if there is an assumption of authority by a mere stranger silence may be evidence of ratification but does not in law constitute ratification.

If A. is P.'s agent, and in contracting with C. exceeds his authority, real or apparent, P. must upon discovering the facts within a reasonable time repudiate A.'s act unless he would be bound upon it. Mere silence in such a case will amount to a ratification. If A., however, has no authority to bind P. for any purpose, mere silence by P. can at most be considered as evidence, which with other evidence will show that P. elected to be bound, but the only safe

thing for P. to do in any case would be to repudiate the agreement if he did not care to be bound.[6]

Sec. 28. RECEIVING BENEFITS. One who with knowledge of the facts accepts the benefits of an act done in his behalf will be held to have ratified the act as a whole. He cannot enjoy the benefits without sustaining the burdens.

The most common instance of ratification is that afforded where the principal receives and enjoys the benefits of his agent's act. If the acceptance is merely accidental or under a mistake of fact, the principal will not be bound, but he cannot knowingly take the fruits of the agent's efforts in his behalf unless he will also assume the cost thereof.[6a] By acceptance of benefits he ratifies the contract of the agent as a whole. Thus suppose a book agent has written authority which he may not exceed. He does however exceed the authority and makes a contract for the company which he has not authority to make. The company, knowing the facts, receive payments made by the buyer. They cannot afterwards repudiate the transaction. Or, suppose, that A., an agent, buys goods for P., having no authority to bind P. for their purchase. P. nevertheless receives and uses the goods. He will be held to have ratified the agency and will be bound upon the contract as A. made it. The question arises, whether, if one has received benefits without knowing all the facts and afterwards learns of the facts, his retention of the benefits will amount to ratification. The general rule is that the

6. Heyn v. O'Hogen, 60 Michigan Reports, 150; Ward v. Williams, 26 Illinois Reports, 447.

6a. Hyatt v. Clark, 118 New York Reports, 563.

retention will be a ratification, if he can return the benefits without injury to him. But the other party would have to be willing and able to put him "*in statu quo.*"

Sec. 29. BY BRINGING SUIT. One may in bringing suit on a contract made in his behalf thereby ratify it.

If one sues on a contract made by another for him he thereby ratifies the contract as a whole. This seems very evident, yet there are many cases where one denies the authority of his agent, even though he has brought suit based upon the agent's act. In such cases he attempts to separate the agent's contract into parts, suing upon one part, but disclaming liability in other respects. This he cannot do. He must repudiate the contract as a whole or not at all.

C. Results of Ratification.

Sec. 30. RATIFICATION CURES ORIGINAL DEFECT. Ratification relates back and takes the place of original authority. Having established the fact of ratification the same results follow that exist where prior authority is conferred.

Ratification relates back and supplies what was lacking. All the results then follow that would have followed had there been original authority; the principal becomes bound upon the contract; the agent is not bound; the agent has the right against his principal and the principal against the agent that would have otherwise existed.

We have already noticed how a ratification of a part of an act is a ratification of the entire act.

Sec. 31. RATIFICATION IRREVOCABLE. Ratification once made cannot be withdrawn.

One cannot with knowledge of the facts ratify and then change his mind. Upon his ratification a contract arises and exists between the parties, and he cannot afterwards undo that contract. He is bound upon it. One can no more revoke a contract effective through ratification than he can revoke any other contract after it is made.

32. PRACTICAL APPLICATION. A showing of facts that would constitute ratification often relieves the court from enquiring into original authority. If, however, there is original authority, either actual or apparent, ratification is not necessary.

Speaking strictly ratification consists in conferring authority with retro-active effect, in cases where there was no authority to do the act in question. If there was original authority there need not be, in fact, there cannot be, ratification. This original authority may be merely apparent to the third person and not real. That is, P. may be bound because he has permitted C. to think that A. had authority to represent him, though in fact A. had none. If that is the case, ratification need not be proved. The principal is bound because of the apparent authority, not because of ratification. Often, however, there will be facts which would unquestionably constitute ratification if there were no original authority. In such a case, if the original authority were questioned, the court might refuse to consider the question of the original authority. Conceding that there was no original authority, there was unquestionable ratification.

PART II.

THE DUTIES AND LIABILITIES ARISING OUT OF THE RELATION.

CHAPTER 5.

THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THE AGENT.

Sec. 33. AGENT'S RIGHT TO BE COMPENSATED. The agent's right of compensation will arise out of his contract, but may be expressed or implied, contingent or certain.

The duties of the principal to the agent are governed by his contract. A chief duty is that of compensation. What compensation is earned, or if indeed any has been earned, are questions that all depend upon the actual contract between the parties. That contract, or terms therein, may be either express or implied. We will consider, then, the questions whether the compensation has been earned, and if so, what is the amount thereof.

Sec. 34. WHEN PROMISE OF COMPENSATION IMPLIED. When from the circumstances, a promise of compensation is reasonably necessary to explain the conditions existing, it will be implied. But one cannot for mere voluntary services as agent claim any right of pay.

The law is that promises are implied from circumstances where such circumstances cannot reasonably be explained except a promise is taken to exist. Thus if I see A. working day by day in P.'s office, it is to be presumed that P. has offered him compensation. That offer indeed need not have been express. The owner of the office, P., may have said: "I need a man to address envelopes for several days, and will employ you for that purpose"; A. may go to work quite safe in the assumption that he may claim what is reasonable. But one cannot by forcing his services on another claim compensation. There must be a contract. Thus, if one without my knowledge is instrumental in my behalf, he can claim no right of compensation.

Where, however, one works at another's request, the promise of compensation will be implied, unless as a matter of fact the party requesting such services can prove that the services were to be gratuitous. And the burden of proof is upon him in such a case. Thus, if A, represents P., as attorney, to try a case for him, it may indeed be a fact that A. promised to work for nothing, but P. must prove this to be the fact.

If one is a member of the family of the party for whom he renders services no duty of compensation will be presumed. Thus if a son works on the father's farm, he would have to prove a stronger case than if he were a stranger, and that the father had made a definite contract with him.[6b]

Sec. 35. WHEN COMPENSATION CONSIDERED EARNED. An agent will be considered as having

6b. Harris v. Smith, 6 Lawyers Reports Anno., 702 (Mich.); Hertzog v. Hertzog, 29 Pa. St. 465.

earned his compensation when he has accomplished that which he undertook, notwithstanding the principal will not avail himself of the benefits, and notwithstanding the principal then revokes the authority before he has availed himself of the benefits.

If an agent undertakes to secure, for instance, a purchaser for ones real estate on certain terms, and he secures such purchaser who is ready, willing, and able to purchase upon the terms proposed, the agent will be considered as having earned his commission,[7] notwithstanding the principal then refuses to go on with the purchase, or notwithstanding, the principal thereupon revokes the authority for the purpose of defeating the agent of his commission and thereupon consummates the purchase himself. In that case the agent has substantially done what he agreed to do, and minor details which might have been required of him are prevented by the act of the principal himself. But if a real estate owner requests a broker to find a purchaser for his property, but *mentions no terms* of sale, and the broker produces one who offers to buy the property on certain terms which the seller will not accept, there is of course no earning of any commission, for in that case the broker has not been the efficient cause of any sale.

Sec. 36. AGENT'S RIGHTS TO DAMAGES IF PRINCIPAL WRONGFULLY REVOKES. If the principal wrongfully revokes the agency, the agent may as in the case of breach of any contract, have his action to recover the damages he may have sustained.

If a contract is broken, there arises at once an action for damages. If an agent is wrongfully discharged, he may not as yet have earned his compen-

7. Tackett v. Powley, 130 Illinois Appellate Reports, 97.

sation, yet he may have what his damages are found to be. There is of course, a *right* to discharge, if the agent has himself been guilty of a breach of the contract, and in that case the agent could not claim damages or compensation. It must also be borne in mind that there are many agencies which are for no stated period, but merely at will, and in such a case a revocation of the agent's authority might be made at any time, and no right of damages would arise; yet, as we noted in the section above, if the agent had done, or substantially done, what he set out to do before the revocation he would have earned his compensation. So there may be a revocable agency, in which one is to receive a reasonable, or an expressly stated, compensation for services actually performed.

Assuming, however, that the authority is wrongfully revoked, and that the compensation agreed upon has not been earned before the revocation, the agent is left to his action for damages. This is quite a different matter from his right when he has earned his compensation. For instance, if I employ a man for a year, he may sue me for the year's salary if he works for the year, but if I discharge him on the first day of the year, then he has earned no salary, yet he may have his damages, and this might be small or large, or none at all, according to the actual circumstances.

It is said that an agent wrongfully discharged has three remedies he may choose among:

(1) He may sue for the reasonable value of the services already rendered;

(2) He may sue at any time after breach and have his damages which he has sustained up to that time;

(3) He may wait until the term has elapsed and sue for all the damages actually sustained by him.

Then suppose P. has employed A. for one year. A. has worked one month when he is wrongfully discharged by P. He may thereupon sue for the reasonable value of one month's services; or any time after the month and before the year has elapsed he may sue for his damages sustained by him up to the time of trial; or he may wait until the year has entirely elapsed and have all the damages which the breach caused him. He could not sue for his *earnings* (salary or wages) after he was discharged. Thus at the end of the second month, he could not sue for the second month's salary, although it would under the contract then have fallen due, for he has not been in P.'s service. But he can only sue for his damages, which might be much less than his salary or wages because he might have employment elsewhere. And having once sued for his damages he could not sue again. Thus if he sues at the end of the second month, he could not sue at the end of the third for damages accruing during the third. For there is but one breach of the contract and he can have only one suit for that breach.[8]

In a suit for damages, such damages are allowed as have accrued up to the time of the trial. It is the agent's duty upon discharge to use reasonable efforts to secure other employment along the same lines, and if he refuses to accept employment offered him or which he might well have secured, his damages are reduced by what he thus might have earned during the period.

8. **Doherty v. Schipper & Block**, 250 Illinois Reports, 128.

What has been said here in respect to agents is true also in respect to any employee.

What has been said has no reference to an agent's right to sue for his salary as it falls due when he is not discharged. Thus he might bring suit at the end of every month for his month's salary when he continued in the service.

Sec. 37. AGENT'S RIGHT TO COMPENSATION WHERE HE HIMSELF IS GUILTY OF BREACH OF CONTRACT. If a contract of agency is separable into independent parts, the agent may recover for the performance of any part, but his breach of any part of an entire and indivisible contract bars him from any recovery whatever, except that in some states, he is allowed to recover a reasonable compensation for beneficial services actually rendered as on an implied contract.

If a contract is really many contracts in one, a breach of one of these is no breach of the others. It has been held that if one is employed by the month, with salary payable at the end of the month, for an indefinite period, he may recover any month's salary notwithstanding his subsequent breach, but in that case the principal could set off his damages, if any, caused by the subsequent breach. On the other hand, if an agent is employed for a year, with salary payable monthly, this is usually held an entire contract and if the agent breaks the contract before the expiration of the year he will be held to have broken all parts of the contract and have no right to recover.

In some states[9] the Courts allow an agent in the case of such a breach to recover as on an implied

9. Mechem on Agency, Sec. 637.

contract for the actual worth of the services rendered to the principal or master. This seems the more just rule, though in strict theory, the rule that one who breaks a contract shall have no right thereon is more logical, and that is the rule in many states.

Sec. 38. AGENT'S RIGHT OF COMPENSATION WHEN HE ABANDONS SERVICE WITHOUT HIS OWN FAULT. Where the agent through sickness or other cause, not from his own fault, quits the service, he may have reasonable compensation.

If an agent or servant has under a contract of employment performed a part of the services, and then is compelled to abandon the employment through sickness, or through any other cause that operates to prevent him from continuing, he may sue to have his reasonable compensation for the services actually performed.

CHAPTER 6.

THE DUTIES AND LIABILITIES OF THE AGENT TO THE PRINCIPAL.

Sec. 39. DUTY OF THE AGENT TO USE GOOD FAITH. GENERAL RULE. The agent must display and exercise the utmost good faith toward his principal.

One employs another as agent out of personal regards. The relationship is a highly personal one. The principal and agent are, it is true, at arm's length in dealing with each other concerning the terms of the agency, but once the relationship has been entered into, the agent then becomes the representative of the principal, the man who stands in his stead, who, so to speak, takes upon himself the identity of the principal, who *is* the principal in respect to that act. It follows therefore that the agent must identify the principal's interests with his own, and that he must not place himself in any position which will tempt him from acting in the very way that the principal would have acted were the principal actually present as he is by a fiction presumed to be present. It is therefore one of the most fundamental and frequently reiterated rules in the law of agency that a principal is entitled to the highest good faith and utmost zeal of his agent, and that the agent will not only be prevented from taking secret advantages, but will not be allowed to even place himself in the way of temptation, though in the particular case no harm thereby resulted to the principal. In the following sections we will note some applications of this rule.

Sec. 40. AGENT CANNOT SECRETLY REPRESENT BOTH PARTIES. An agent cannot without consent of both parties be the agent of both of them and receive double compensation. In such a case he loses his right to all compensation, and if either party is privy to his double dealing, the other party may avoid the agreement.

An agent of one person cannot be the agent of the other with whom he is sent to deal. To permit this would lead him into temptation to betray one of his principals.[10] If both parties know of the double agency and consent thereto, there then can be no objection, but otherwise the agent loses all right of compensation by either party, and if either party knows of the double agency and knows that the other party does not know of it, the contract is voidable at the instance of the innocent party.

This rule is based on the fact that a principal is entitled to the utmost fidelity of his agent, and therefore is entitled to have the agent keep himself from the temptation to betray his interests. It is entirely immaterial whether or not the agent did betray his trust, or did anything unfair. Indeed he may have acted in all good faith and without any disadvantage to his principal. This is of no moment. The only

10. Gann v. Zettler, 60 S. E. Reporter (Georgia) 283, in which the court said: "It is recorded of him 'who spake as never man spoke,' that, 'seeing the multitudes he went up into a mountain, and when he was set, his disciples came unto him; and he opened his mouth and taught them, saying: * * * 'No man can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other.' So, also, is our law."

safe rule to apply is the rule that the agent cannot place himself in the way of temptation. If he does so, further inquiry need not be made; the rule will simply be applied, that, what he has done, shall redound to the benefit of his master, and he loses his right to compensation, or if that has been paid, it can be recovered.

Sec. 41. AGENT CANNOT BUY FROM OR SELL TO SELF. An agent employed to buy or sell cannot secretly buy from or sell to himself.

If one sells his own property it is human nature that he should desire to sell at the highest price he can get, and if he buys property, he would buy it as cheaply as possible. If I employ an agent to sell property belonging to me, I employ him to use his efforts in my behalf to get the highest price he can, and if I employ him to buy for me, I do so under the implied understanding that he will purchase on the most favorable terms to me that he can get. Clearly, then, if he buys from or sells to himself he is opposing his interests to mine. If I know he is doing this, then I am on my guard and can protect myself, but otherwise he betrays or is tempted to betray my trust in him. Therefore, buying from or selling to himself is forbidden, and the principal may upon discovering the facts have the transaction rescinded. And what may not be done directly may not be done indirectly, that is, the agent acquires no further rights by acting through another and in that other's name.

Sec. 42. AN AGENT CANNOT TAKE SECRET PROFITS AND BENEFITS. An agent cannot use his agency to obtain secret profits and benefits.

Upon the same principles, an agent will not be permitted to use his agency for the purpose of making secret profits and taking secret benefits, and such profits and benefits will accrue to the principal. Thus if he uses the principal's money for purposes of speculation, and thereby makes a profit, the principal will be entitled thereto, or if he purchases or acquires for himself property which the principal has an interest in acquiring, it will be considered that he acquired it for the benefit of the principal, if the principal desires to take it. Thus suppose the case that an agent of a lessee of a theatre, acting upon the knowledge and in the advantage secured by his agency, secured to himself a renewal of his principal's lease, and it was held that it would be considered that the agent acquired it for the benefit of his principal.

So profits made in the scope of agency will be considered as made for the benefit of the principal. If an agent is employed to sell for one price and succeeds in selling for a higher one, the excess belongs to the principal.

Sec. 43. DUTY OF AGENT TO OBEY INSTRUCTIONS. The agent is liable for damages resulting from disobedience of instructions, and may be discharged on account of such disobedience.

If an agent in any material way disobeys the instructions of his principal, he will be responsible, notwithstanding his disobedience was based upon his better judgment. Thus if an agent is instructed to ship by one route and ships by another, or ordered to make a collection through a certain agency and he attempts to make it through another one, and loss ensues he will be held responsible. Of course

in obeying instructions it would be his duty to inform his principal if he had knowledge of conditions which would probably bring loss upon the principal, and so there might be times when in emergencies he would be justified in acting upon his own discretion as a reasonable man should have acted.

Sec. 44. DUTY OF AGENT TO USE CARE AND SKILL. If an agent is negligent in the pursuit of his duties, he will be responsible for loss if loss occur. What constitutes negligence depends on the circumstances.

An agent must act with reasonable diligence and skill. If he is negligent in doing the work intrusted to him he is responsible for the losses thereby occasioned. Thus if an attorney at law undertakes to collect a claim, and does not act with reasonable promptness and loss thereby results, he may be held responsible for the consequences.

What constitutes reasonable diligence depends upon the circumstances. One agent, professing to have expert skill, as, for instance, a surgical specialist, might be expected to use more skill than another, as, say, a general practitioner in medicine. And one who does not profess to be an expert or skilled at all in the line in which he is employed cannot be held to the high standard of skill and care that is to be expected from one who makes skill in such work a profession. If I employ one whom I know to be a common laborer, to do, say, plumbing work, in my residence, I cannot hold him responsible where I might hold a professional plumber.

If an agent acts gratuitously, he may or may not be required to use the skill which would be required in a

paid servant, according to circumstances. If one professes to have skill in some work, and bestows that work without any reward, the lack of reward is of no moment. Thus a physician giving his services free in a matter in which he professed to have particular skill, must not be any more negligent than if he expects to receive a reward. But if one does an act merely as a favor, professing no peculiar skill therein, he will be held only to the exercise of good faith.

Sec. 45. LIABILITY OF AGENT FOR NEGLIGENCE OF SUB-AGENT, EMPLOYED BY HIM. If an agent is employed to secure an agent for the principal, he is not responsible for that agent's negligence, provided he used due care and diligence in securing such agent, but for the negligence of his own agent employed to help him in his agency he is responsible.

If an attorney at law is engaged to litigate a matter, and his clerk is entrusted with watching the case in the Courts, and by his negligence causes costs or damages to accrue, the attorney is responsible to the client for these costs or damages. The clerk's act is the act of the attorney. But suppose that one attorney about to make a trip to another jurisdiction, is employed to retain counsel in that jurisdiction. His duty is performed when he has used reasonable care and diligence in making the selection. If the attorney so retained, is afterwards negligent in his care of the matter, the client must look solely to him.

The question in these cases is, is the first agent employed to do the act, or to secure an agent or servant to do the act.

The application of the rule is in some cases difficult. Take this situation: P. employs A., a bank

in Chicago, to collect a note payable in New York City. P. knows and expects that A. will send the note to a New York correspondent. If this New York correspondent is negligent in presenting the note for payment, is the Chicago bank liable, or must the principal have his recourse against the New York bank, and if that fails, be without remedy? It is simply a question whether the New York bank is to be regarded as an agent of the Chicago bank or an agent of P. secured for P. by the Chicago bank. The Courts are at variance on this question. In Indiana, Michigan, Montana, New Jersey, New York, Ohio, and perhaps some other states, and in the United States Supreme Court, the rule prevails that the correspondent bank is the agent of the bank employing it and that the latter is responsible to the client for the negligence of the former. In Connecticut, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Pennsylvania, and Tennessee, the rule is otherwise. In such a case the owner of the paper must look to the correspondent bank, provided the employing bank used due care in selecting the agent. If that agent becomes insolvent, the client is without remedy for its negligence in presenting the paper. This, it is seen, is the rule most broadly adopted.[11]

11. First National Bank v. Sprague, 15 L. R. A., 498 (Nebraska), (stating the rule in various jurisdictions, and setting forth this court's reasons for adopting the rule which does not hold the bank liable except to use due care in the selection of a correspondent bank)

CHAPTER 7.

THE DUTIES AND LIABILITIES OF THE AGENT TO THE THIRD PERSON.

Sec. 46. GENERAL STATEMENT. Where the agent regularly pursues his authority and acts as an agent and not as principal, and is guilty of no wrong, he is not liable to the third person with whom he acts for the principal.

We have already considered that an agent is an intermediary, a mere representative, employed to make or in some way affect contractual ties between his principal and third persons. That done, he drops out; no liability attaches to him. This is a matter of common knowledge; the agent who writes insurance does not become liable on the policy; the real estate agent who sells the land of another, assumes no responsibility upon the contract; the agent who procures a loan for his principal is not liable if the principal does not repay. The agent is not surety for the master.

An agent binds the principal when the principal holds out, expressly or impliedly, that the agent has authority. This authority the agent may not actually have; it is enough that the principal places the agent in such a position that a third person may assume him to have such authority. There is a holding out by the principal, and it is on that holding out that the third person relies in dealing with the agent. But we may have another set of circumstances.

There may be a holding out by the agent, and none by the principal, upon which the third person relies. The agent may come to me and say, "I am P.'s agent for this purpose", and I may rely on that alone. In that case I cannot hold P. if A. was not authorized by P., and furthermore I cannot hold A., the agent, on the contract, because I did not purport to make that contract with him, but with P., through him. Yet A. has represented to me by his words or acts that he was P.'s agent, and acting upon that representation I have done things whereby I am damaged unless I can hold somebody. Therefore the law gives me the right to hold A., upon a warranty that he has authority.

We will consider this liability and also the other cases of the agent's liability to third persons.

A. Liability of Agent in Contract.

(a) *The agent warrants his authority.*

Sec. 47. WARRANTY OF AUTHORITY BY AGENT. If an agent expressly claims to have authority or by his acts indicates that he has authority, he warrants his authority; but if the third person knows the facts as well as the agent, there is no warranty.

An agent may expressly state that he has authority. He may do this because he thinks he has authority or because he intends to deceive. In either case he is liable to the person who thus deals with him, and who on account of lack of authority, apparent or real, could not hold the principal, and therefore suffers damages. Thus suppose that A. states to C. that he has been sent by P., to purchase C.'s cattle. C. thereupon delivers his cattle to A., to deliver to P. The cattle die on the way through no fault of A. In

this case if A. had had actual or apparent authority, he could not be held, as the contract would be between C. and P., with A. as a mere representative of P. P. would be responsible as delivery to his agent would be delivery to him. But if A. lacks authority C. is not without remedy. He can hold A. upon his statement that he has authority, on the strength of which he parted with the cattle.

If, however, in this case, C. was in possession of all the facts, and in common with A., misconstrued them, he could not hold A. Thus if A. had said: "I have here a letter which P. has sent me, in respect to the purchase of cattle, and I think from it that I have authority to buy cattle," and C., upon reading the letter, had assented to that view, yet the legal effect of the letter was not to give A. authority to buy cattle, but merely, say, to make inquiries concerning their purchase, here there would be no warranty by A. of his authority, for there would be no reliance upon A.'s assertions that he had authority.

Sec. 48. AGENT'S IMPLIED WARRANTY OF AUTHORITY. If a person deals with another under such circumstances that the latter may assume that the former believes he has authority and means to represent himself as having such, there is an implied warranty of his authority.

It is not necessary that the agent expressly state that he has authority. An implication to that effect may arise from the facts, and this would, perhaps, be the more usual case. Indeed, the agent by acting as agent and by purporting to bind another person as principal, holds himself out as having the authority to so act and thereby warrants himself to have authority.

(b) *Agent having authority to bind principal may instead bind himself.*

Sec. 49. GENERAL STATEMENT. One who is an agent and has full power to bind his principal may nevertheless bind himself.

There is nothing to prevent an agent from binding himself upon a contract made by him. He may do this for a variety of reasons. He may be careless in the execution of his authority. He may not disclose the principal, preferring for some reason to let only his own identity appear. Or it may be that his principal has not sufficient credit with the person dealt with and therefore the agent binds himself.

Sec. 50. PRINCIPAL UNDISCLOSED. If the principal is undisclosed by the agent the agent is liable.

If the agent does not disclose his principal, the agent is liable. In some such cases the third person upon discovering the principal may elect to hold him, because he is the real party in interest, as we shall see later; but he may, if he choose, in all cases, hold the agent.

Sec. 51. WHEN AGENT BOUND ON SEALED INSTRUMENTS BY THE FORM OF HIS EXECUTION. It is a long established rule that only those who are named or described in and sign a sealed instrument are bound thereon. If the agent signs his own name only, though he describe himself as agent, he will be bound and the principal will not be bound.

By the law of sealed instruments, only those can be sued thereon who are parties thereto. An agent may, by careless execution of a sealed instrument,

bind himself when he intended only to bind his principal. We may indicate here the proper form one should use and that will be about the extent to which in this discussion we can go. The books are full of discussions of particular sets of facts and courts are at some variance upon similar cases. But there are well established forms of execution which every man should have in mind when he executes such paper.

First let us note that it is everywhere agreed that if one merely describe himself as agent, that in itself is not sufficient to bind his principal. Thus if he signs "John Brown, Agent," or "William Smith, President", or "Harry Jones, Trustee", etc., these descriptive words are *merely* words of description and in no way qualify the liability of the party signing. And it is also everywhere agreed that if one go further and say "John Brown, Agent of Thomas Anderson", the deed is the deed of John Brown. So one can go into a multitude of form. The proper and safest mode of description and signature is as follows: to recite in the body of the instrument "Thomas Anderson, by John Brown, his agent", or the "Harris Manufacturing Company, by William Smith, its President", etc.; and to sign as follows: "Thomas Anderson (seal), by John Brown, Agent", or "Harris Manufacturing Company (seal), by William Smith, President."

These forms have been held good to bind the principal, but they are not such good usage—"A. B., for C. D.," "for C. D., A. B."

It is not absolutely essential that the agent's name should appear. Yet it is highly desirable, in order that the evidence may be the more surely preserved and other reasons of convenience. It is there-

fore common and the better usage for the agent to set forth that the execution is by him as agent. Even in those states where statutes have abolished the seal, the above form of signature is the only safe one to use.

Sec. 52. WHEN AGENT BOUND ON NEGOTIABLE PAPER BY THE FORM OF HIS EXECUTION. Only those described in and who sign negotiable paper are bound thereupon.

What has been said in respect to sealed instruments is also true of negotiable paper. If an agent signs negotiable paper in which only his own name appears, he is personally liable upon it. The forms indicated in the preceding section are subject to the same considerations here, except that a negotiable instrument should not be sealed.

Sec. 53. WHEN AGENT BOUND ON OTHER CONTRACTS BY THE FORM OF HIS EXECUTION. An agent is bound if he in terms charges himself on any contract, but if from all the language used, it appears that he did not intend to charge himself, but a principal therein named, he will not be personally liable.

An agent should be careful in the case of any contract, sealed or unsealed, negotiable or not, to make it appear that his principal and not himself is bound. Yet simple contracts are often hastily made and ambiguously worded and it may be hard to state what the intention was. It is clear that if the agent uses *only* his own name, though he may use the word agent, he only will be bound and he cannot show that he intended to bind some one else in order to free himself (although as we shall see, the other party may hold the real principal or the

agent at his election where the principal is undisclosed). But if the name of the principal appears in the body of the instrument or in the signature and from the entire contract it may be gathered as a reasonable inference that the agent intended to bind the principal, then the agent can plead that he is not personally bound. No fast rule can be laid down in these cases except that where the agent uses approved forms as heretofore indicated, there can be no question that he is not held, and the further rule that if he does not name the principal *at all,* though he describes himself as agent, the other party may, if he chooses, hold him personally.

Sec. 54. AGENT BOUND WHERE NO DEFINITE OR RESPONSIBLE PRINCIPAL. If a person represents a large, unorganized or irresponsible body, it will be presumed, unless the contrary appears, that the representative was given the credit.

If a committee representing a large public gathering as a political party, an unincorporated club, etc., deals with others for supplies, it is reasonable under the circumstances to presume that it is the committee to whom the credit is given, and such committee will usually be personally responsible. Wherever there are situations of that sort in which the credit appears to be given the agent and he must have known it was so given, he will be responsible.

B. Liability of Agent in Tort.

Sec. 55. AGENT RESPONSIBLE FOR HIS TORTS. An agent is responsible to third persons for torts committed by him, whether the principal is liable or not for them.

An agent is responsible for his torts committed by him whereby third persons are injured. In such a case the principal may be also responsible, as we have seen. Thus, for his fraud, his negligence, his conversion of another's goods, and generally for his misfeasance of any sort, the agent is liable. The third person injured by such tort need not elect whom he will sue. He may sue both, and have judgments against both.

CHAPTER 8.

THE DUTIES AND LIABILITIES OF THE PRINCIPAL TO THE THIRD PERSON.

A. Liability in Contract.

(a) *Principal undisclosed.*

Sec. 56. LIABILITY OF UNDISCLOSED PRINCIPAL. GENERAL RULE. If the principal is undisclosed at the time of the transaction, but subsequently discovered, the third person may elect to hold such principal because he is the real party in interest.

We have heretofore noticed that an agent may keep his principal undisclosed, and bind himself upon the contract. He may do this because he acts under instructions to that effect, or because he is careless in the manner in which he performs his agency, or because for some reasons he chooses to bind himself. In such a case, he becomes, as we have seen, personally liable to the third person. But the third person, upon discovering the identity of the principal, may, subject to the exceptions hereafter stated, choose to hold the principal. This arises out of the consideration that the principal is the real party in interest and identified in the transaction with his agent, and that as he is the real party, it ought to be the third person's right to hold him as such.

Thus we may suppose that A. is about to buy goods of C. for P. He chooses however, to act in his own name and either to keep the fact concealed that there is another person who is principal, or

if he discloses the fact that there is a principal, then to keep that principal's identity concealed. He therefore makes a contract with C., whereby for certain goods which C. delivers him, he promises to pay C. a certain amount of money. This is, say, a written contract executed in A.'s name as though he were the real principal. C. can hold A. on this contract, whether he knows that A. is only an agent or not. And if *at the time,* he does know that A. is only an agent and knows the identity of A.'s principal, he cannot afterwards hold P., because in that case he may be said to have deliberately chosen to make his contract with A. and not with P. If, however, at the time he does not know that A. is merely an agent, or if he does know he is an agent but does not know the principal's identity, then he may upon discovering the identity of the principal, either continue to hold A. or elect to hold P.

This rule, however, is subject to some exceptions which we will notice.

Sec. 57. FIRST EXCEPTION TO RULE. Third person cannot hold principal on election to hold agent. If the third person after discovering the principal's identity elects to hold the agent, he cannot afterwards hold the principal. The third person must elect to hold the principal within a reasonable time, but his election need not be verbal. It may be inferred from his conduct.

The third person has contracted with the agent as a principal. He may hold the agent as the contracting party, because the agent has seen fit to keep the principal concealed, and to bind himself. Upon discovery of the identity of the principal the third person may hold him as such. But he must make

his election, and having made it must stand by it. A failure within a reasonable time to indicate by word or act that he chooses to hold the principal will be taken as an election to hold the agent and he cannot afterwards say he will hold the principal. A third person, however, cannot be said to have made his election so long as he is unadvised as to the facts. Thus, billing the agent as the real debtor, taking notes from him, etc., would be immaterial to show an election before the facts has become known to the third person. If, however, he continues in these or other ways to treat the agent as the real debtor after discovery of the facts, that will constitute an election.

Sec. 58. SECOND EXCEPTION TO RULE. Third person's right to hold principal subject to state of account between principal and agent. If the state of accounts between the principal and agent, as where the principal has paid money over to the agent to pay to the third party, renders it inequitable to allow the third person to hold the principal, he cannot hold such principal and must be satisfied with his recourse against the agent.

Giving the third person the right to hold the undisclosed principal when discovered, is giving him a right to rely upon a source which he did not rely upon when the contract was made. It would be really no hardship upon him to deny him the right altogether for it would not be depriving him of anything which he had relied upon. Therefore the rule is not extended where it would operate as a hardship upon the principal. Thus if the principal believing that the agent has settled with the third person, or

in order that he may settle with the third person, pays the agent money, so that if he had to pay the third party it would amount to paying the account again if the agent were not responsible, then the third person cannot hold the principal, but must look to the person to whom he looked when the contract was made. It is consequently declared that the rule is subject to the state of accounts between the principal and agent. The payment or settlement must, however, have been made in good faith, and it must have been made *before* the third person elected to hold the principal.

Sec. 59. THIRD EXCEPTION TO RULE. Rule does not apply to sealed instruments. Only those in whose name a sealed instrument is executed can be held liable thereon.

We have already seen that one cannot be held on a sealed instrument if he is not named therein, or indeed unless it may be said to be executed hy him in person or by agent. Consequently the rule we are now considering does not apply if the contract is under seal.[12]

In some jurisdictions the seal has lost some of its ancient force and in some has been altogether abolished. In such states the rule would apply as well to a sealed instrument as to any other.

Sec. 60. FOURTH EXCEPTION TO RULE. Rule does not apply to negotiable instruments. Only those in whose name a negotiable instrument is executed can be held liable thereon.

12. Walsh v. Murphy, 167 Illinois Reports, 228.

We have noted, also, that one cannot be held liable on a negotiable instrument unless it is made in his name. Consequently the rule we are now considering has no application to negotiable instruments.

Sec. 61. WHERE UNDISCLOSED PRINCIPAL HAD NOT CONFERRED AUTHORITY. Third person cannot hold undisclosed principal except in cases of actual authority previously conferred. An undisclosed principal cannot ratify. He can be held by the third person only in case he gave actual authority to the agent prior to the time the agent acted, to do the very act that the agent did.

We will discuss hereafter, as we have already noted, that a third person may hold a *disclosed* principal where the agent lacked real authority, but had *apparent* authority to do the act by reason of the situation in which the principal placed him. We have also noticed that where there is no authority, either actual or apparent, a disclosed principal may cure the defect and become bound by *ratification*. None of this reasoning applies to the case of an undisclosed principal. The third person can hold him only in cases where the agent pursued the actual authority given him. There is no room for the doctrine of apparent authority, for there can be no apparent authority where there was not known to be any authority, or any particular authority. And it is also settled that the third person cannot claim that the undisclosed principal ratified the act. An undisclosed principal cannot ratify.

(b) *Principal disclosed.*

Sec. 62. GENERAL RULE. A principal in whose name a contract is made is liable to the third person as

though he had made the contract in person provided there was real authority or apparent authority to do the act, or, there being no such authority, the principal afterwards ratified his agent's act.

We may find three situations in which a principal who is disclosed at the time of the contract and in whose name the contract is made is liable thereon.

1. Where the principal actually authorized the agent to make the very contract or do the very act done.

2. Where there is no actual authority, yet from the situation in which the principal places the agent, the third person may presume there is authority. The agent is then said to have apparent authority.

3. Where there is neither actual nor apparent authority, yet the act is done in the name of the principal and the principal afterwards ratifies the act. This situation we have already considered.

Our chief concern at this point will be to consider the question of apparent authority. If actual authority has been conferred to do the act done, then the principal is liable. If the authority conferred is legal in its purpose and clear in its terms, then there can be no very difficult questions concerning it.

We assume throughout this discussion that the agent has executed the authority in a manner which will bind the principal if he has the real or apparent authority to do so.

Sec. 63. UNAUTHORIZED ASSERTIONS BY AGENT OF HIS AUTHORITY. A principal is not bound by the unauthorized assertions of authority made by the agent.

It is very clear that no one can hold another as principal merely because a certain person has repre-

sented himself to be an agent. Business would then be chaos, indeed, and no man could know what obligations another might fasten upon him. Just as no man's property can be taken from him by forgery or theft, so no contract may be fastened upon him by another's unauthorized representation of him. All authority to act as agent must be traceable back to some word spoken or some act done by the principal, upon which the third person is entitled to rely as a representation not only that the agent is an agent, but also as such agent, he has authority to bind the principal upon this very contract. The agent may in such a case exceed his real authority; he may disobey secret instructions, he may do things that the principal never contemplated that he should do, and the principal may be held; yet in such a case there must still be something said or done by the principal upon which a third person may reasonably base a belief that the agent had the power in question.

Sec. 64. WHAT APPARENT AUTHORITY HAS AGENT? The apparent authority of an agent depends upon the nature of the appointment. It is usually said that a general agent has a large apparent authority, while a special agent has little or none.

We have already considered that a special agent is one specially authorized to make some contract, and having no general authority to represent the principal in any line of conduct. His authority is specially conferred and will not be extended beyond its express limits. If P. authorizes A. to bind him in the borrowing of $1,000, A. cannot bind P. in the borrowing of any other sum. If P. sends A. out to collect notes that are due, P. is not bound by

any attempted extension made by A. on any such notes. The third person with whom the agent deals is put on guard to discover what the special agent's actual authority is. He knows that the authority is special and restricted, and he must look to that actual authority. He should inspect the written letter of authority, or in some way trace back the assertion of the authority to the principal.

A general agent, also, cannot bind the principal except upon assertions or representations by word or act of the principal, yet the very fact that one has made another a general agent is, in itself, a representtion that such agent has the general and broad powers which parties placed in that situation usually have. Thus if one is made a general manager of a grocery store, it is a reasonable inference that he has all the powers which one usually has in such a situation, and that he may buy and sell goods, extend credit, and bind his principal on all contracts properly and regularly made in the conduct of the business. Whatever secret instructions he may have are immaterial. A third person is not bound to assume that there are secret instructions. He has no concern with the secret arrangements between the two and need not concern himself with the written authority so long as the act done is an act within the apparent scope and not an unusual act, that is, such an act as this general agent would not reasonably be supposed to have the power to do unless specially conferred.

The apparent powers of a general agent depend upon the facts of each particular case. One may be a general agent in a comparatively small or in a comparatively large way. One is a general agent whenever some line of action is given him which

involves a general management thereof and the taking care of details upon one's own responsibility. Thus a manager of a store would unquestionably be a general agent, but an agent appointed specially to sell a piece of real estate would be a special agent. And if he were separately employed by the same principal a hundred times in one year he would still be a special agent, for his authority would in each case be specially conferred.

We will hereafter consider various kinds of agents and consider the apparent authority of each.

Sec. 65. ADMISSIONS OF AGENT. The admissions of the agent are binding on the principal when made in reference to and as a part of the act which he is authorized to do.

If the agent makes admissions in reference to the act which he is authorized to do, as a part of the transaction, the principal is bound by such admissions and they may be used against him. It is essential that the admission be made as a part of the act which he is authorized to do, and from this it follows that admissions made after the act is over, so that they do not form a part of the act are not binding upon the principal. So they are not binding if made before the act is begun; they are not a part of it and therefore are not admissible. It does not follow from this that there may not be some little separation between the doing of the act and the making of the admission, so long as it is made as really a part of it. Each case must be decided on its own peculiar grounds and the court must consider whether the admissions are a part of the thing done—the *res gestae*—or are an afterthought, or in-

dependent of the act. The reason of the rule is that a principal ought not to be bound by assertions made at any time and possibly out of wrong motives, and when the truth may be consciously or unconsciously departed from, as a result of deliberation; but if they are spontaneously uttered by the agent at or about the time the act is done and as a part of it, they possess the likelihood of truth. Thus if an agent being in the delivery of goods sold under a contract should at the time admit that they were defective, this admission might be used as evidence going to prove that the vendee was justified in refusing the goods, but admissions made by the agent after that time would not be considered by the court as binding upon the principal. Such agent could indeed be called at the time of the trial as a witness to prove the defective condition of the goods, just as any witness could be called who had personal knowledge of the facts, but his admissions made out of court could not be received as any evidence of the fact.

Sec. 66. NOTICE TO AGENT. Notice given to an agent while acting as such is notice to the principal and the knowledge of the agent which he possesses at the time of the transaction will be imputed to the principal, (1) unless it is his duty not to disclose it, or (2) unless he is known to be acting adversely to the principal.

A principal is constructively present when the agent acts for him and in the act the agent and the principal are identified together. Whatever notice the agent receives in respect to the transaction which he is carrying on is notice to the principal, and whatever knowledge the agent has in respect to that trans-

action is presumed to be the knowledge of the principal.

If the knowledge which the agent has is knowledge that he is not at liberty to disclose to his principal, it will not be imputed to the principal. Thus disclosures confidentially made by one client to an attorney at law cannot rightfully be disclosed to another client, and therefore will not be imputed to that client, though they affect the matter of the agency.

So if an agent is known to be acting adversely to his principal, it is not to be presumed that notice given to him or knowledge in any way acquired by him will be imparted to the principal, and therefore the principal is not bound thereby.

B. Liability in Tort.

Sec. 67. GENERAL STATEMENT. A principal is responsible to third persons who are damaged by torts committed by the agent within the scope of his authority.

When an agent does an act for the principal, the principal is theoretically present doing it. If while engaged in the performance thereof the agent commits a tort which may be said to be a part of it, the principal will be held as though he had himself committed the tort or counselled its commission. The tort, however, must be a tort which really forms a part of the act which the principal authorized; it must be done in the course of the employment and within the scope of the authority given him.

The fact that a principal will be held for the torts of the agent is based upon sound policy. It results in making a principal careful in choosing his agents,

and it prevents secret arrangements between the principal and agent that the agent shall commit a tort apparently unassented to by the principal.

SEC. 68. WHAT TORTS WITHIN THE SCOPE OF THE AUTHORITY. A tort is within the scope of the authority whenever it is advised by the principal, or though unadvised, whenever it may be said to constitute a part of the act whereunto the agent was authorized.

If the principal counsels the agent to commit a tort, or aids in the tort, he will of course be liable. The majority of torts committed by an agent are torts which are not advised. Nevertheless the principal may be liable upon them, provided they may be said to be within the scope of the authority. This depends on the facts of each case. It is said that no general rule can be laid down which will cover all the cases.

Negligence is a common tort committed by an agent or servant for which the principal is held. Thus if an agent or servant being about his principal's business carelessly drive his principal's team of horses upon the property or person of another, the principal will be liable; or if the agent have the care of goods which the principal has taken as bailee and carelessly cause their loss or damage, the principal will be liable. And so for torts intentionally committed the principal may be liable, as where one employed to sell goods, misrepresents them, or where an agent converts to his own use the goods belonging to another; or for torts arising out of mistake, unskillfulness, lack of knowledge, etc., the principal will be liable.

The fact, however, that one is an agent when he commits a tort, will not make his principal liable therefor if the tort is not within the scope of the agency, even though the agent might do it with some reference to the subject matter of the agency, as where he might assault a competitor.

CHAPTER 9.

THE DUTIES AND LIABILITIES OF THE THIRD PERSON TO THE PRINCIPAL.

Sec. 69. PRINCIPAL DISCLOSED. GENERAL RULE. If the third person through the agent makes a contract with the principal, then the third person becomes bound thereupon as though he had contracted directly with the agent.

We may pass with a word that if a principal makes a contract with the third person through the agent, then the principal and third person are bound together upon the contract and it is as though the act had been done by each in their own proper persons. This has been the purport of our entire text.

Sec. 70. PRINCIPAL UNDISCLOSED. If the principal is undisclosed, the principal may at his election hold the third person on the contract, except, (1) where the state of accounts between third person and agent would make it unjust, or (2) where the contract is under seal, or (3) is expressed in the form of negotiable paper, or (4) also where the rights sought to be asserted by the principal are rights to personal service, or the performance of personal obligations.

We have seen how an undisclosed principal can be sued when discovered by the other party. There is the corresponding right of the principal to step into his agent's shoes, disclose himself and assert

his rights under the contract. This rule is subject to exceptions.

First. If the third person has already paid the agent he will not be compelled to repay the principal, but the principal must look for settlement from the agent.

Second. The reasoning concerning instruments under seal set forth in section 59 is applicable here.

Third. The same may be said where the contract is in the form of a negotiable instrument.

Fourth. The third person can only assert rights which do not involve the performance of services personal in nature, or involving the personal skill or credit of the undisclosed principal. Thus if C. deals with A., as a principal, whereas A. is in fact an agent, P., the principal, can only step in where that would not affect C.'s rights any more than if A. had made an assignment to P. of rights under his contract. But A. cannot assign nor can an undisclosed principal assert rights to personal services, nor obligations personal in nature. If C. had dealt with A. he has a right not to have another party to the contract thrust upon him. One may choose with whom he will contract. Yet as to rights growing out of such contract which are not personal in nature, as a right to receive money, just as they may be assigned, so they may be asserted by an undisclosed principal.

PART III.

PARTICULAR CLASSES OF AGENTS.

CHAPTER 10.

FACTORS.

Sec. 71. DEFINITION OF FACTOR. A factor, or commission merchant is an agent, who receives goods from the owners thereof to sell for a commission. Where he sells upon a guarantee of payment of debts arising in the course of the agency he is called a del credere factor. He has the possession of the goods that he sells, and usually sells them in his own name.

A factor, or a commission merchant, is one who for the various owners who choose to employ him, takes possession of their goods and sells them upon commission. He differs from a *broker* in that he has the possession of the goods and has broader powers. A broker brings buyer and seller together, does not have possession of the goods, and usually does not act in his own name. We have defined, heretofore, a *del credere* agent. The factor, more than other agents, sells upon a *del credere* commission.

A. The Factor's Authority.

Sec. 72. IMPLIED AUTHORITY OF FACTOR. A factor has the implied authority, when not instructed otherwise, to sell goods at the usual credit

to responsible parties, to observe the usages of that particular market, to make usual warranties, to sell in his own name, and to receive payment.

Considering now what authority a factor may imply from his appointment, where the subject is not covered by express stipulation, we find that he has a broad authority. The goods are in his possession and he is instructed to sell them. He may sell in his own name, and he may also give the credit that is usually given at that place in such sales. He may take back negotiable paper, and he may receive the purchase money. He may also make such warranties as are usual. He has a right also to presume that the owner authorizes him to observe all the customs, rules, and usages that obtain in that particular market. But where the factor has positive instructions covering these points, he must observe them.

Sec. 73. POWER TO PLEDGE. A factor, being authorized to sell, has no power, apparent or otherwise, to pledge his principal's goods for his own debt, or to use such goods in the payment of his own debt.

A factor has no right or apparent authority to use the principal's goods as a pledge for a loan to himself.[13]

Numerous states, however, have passed *Factor's Acts*, which protect *bona fide* purchasers and pledgees, who have acted on the faith of an apparent ownership, and under such an Act a pledgee would be protected to the extent of his pledge.[14]

13. Commercial Bank of Selina v. Hurt, 99 Alabama Reports, 130.

14. Factor's Acts are in force in Maine, Maryland, Massachusetts, New York, Ohio, Pennsylvania, Rhode Island and Wisconsin. See Vol. 3 of this series, Sec. 45.

We should also note that where an agent is entrusted not only with possession of goods, but with documentary indicia of title, as a warehouse receipt or bill of lading, the owner may be estopped to assert his ownership.[15]

B. The Factor's Duties.

Sec. 74. DUTY TO OBEY INSTRUCTIONS. A factor is bound to obey the instructions of his principal.

We have already considered how an agent must obey instructions. The factor is no exception to this rule. A sudden emergency may justify a departure from the instructions, and also, as we will see, a factor may have acquired special rights by reason of advances made, that he cannot be deprived of by the owner's instructions.

Thus if a factor have instructions to sell goods at a certain time or at a certain place or at a certain price, he must make the attempt to do so and his disobedience of instructions for the owner's benefit, will furnish him no defense where the owner sustained loss by reason of such disobedience.

Sec. 75. FACTOR'S DUTY TO USE CARE IN KEEPING GOODS. His duty to insure. A factor must not be negligent in keeping the goods. He must use ordinary care. He need not insure unless there are instructions to that effect or a custom with reference to which the parties may be deemed to have contracted.

A factor is a bailee, and must use care in keeping the goods. If they are lost or destroyed or damaged because of his negligence, he will be responsible. If

15. See the Volume on Sales in this Series, Sec. 40.

they are lost without his fault, that is, not through his negligence, he is not responsible. If he had agreed to insure, and has not insured, he will himself be deemed the insurer and responsible in case of loss for any cause which he should have insured against. Where there is a custom of such general observation that the parties may be deemed to have contracted in reference thereto, it will be deemed a part of the contract.

Sec. 76. FACTOR'S DUTY TO USE GOOD FAITH AND NOT TO OPPOSE HIS OWN INTERESTS TO THOSE OF PRINCIPAL.

A factor, as in the case of any agent, must not oppose his own interests to those of his principal. He must not make secret profits, buy or sell to himself unknown to his principal, or represent two principals at the same time without their consent.

C. The Factor's Rights.

Sec. 77. THE FACTOR'S RIGHTS OF COMPENSATION. The factor's compensation is usually on a commission basis. The extent of his commissions may be governed by special contract or by custom.

A factor is entitled to compensation upon performing the contract. If the principal breaks the contract the broker is entitled to his damages which might amount to the commissions he would have received had he been allowed to perform. Commissions may be the commissions expressly agreed upon or left by implication to the government of usage.

Sec. 78. FACTOR'S LIEN. A factor has a general lien on the goods which are not sold and on the price and securities of such as are, for his just charges and expenses.

For his advances and expenditures a factor has a lien by the common law and under the statutes. He may sell enough goods to satisfy this lien. He loses his lien by voluntarily parting with the goods. The lien does not exist unless he has possession of the goods.[16]

D. Rights of Third Parties Against the Factor and the Principal.

Sec. 79. RIGHTS AGAINST FACTOR. The rights of a third person against a factor are those given by the general law of agency.

We have considered the right of a third person against an agent who makes disclosure of his principal and one who conceals the principal and deals in his own name. The same reasoning applies here.

Sec. 80. RIGHTS AGAINST PRINCIPAL. The principal is liable according to the general laws governing the liabilities of one who, concealed or unconcealed, acts through an agent.

A principal is liable, as we have seen heretofore, in tort or contract for the acts of his agent done within the apparent scope of the authority. The same reasoning applies to the factor.

16. Warren et al. v. First National Bank of Columbus, 149 Illinois Reports, 9, at page 36. "So putting the goods upon the factor's dray to be drawn to his warehouse is a sufficient delivery [to the factor to give him his lien] * * * some of the cases hold that * * * a delivery to a common carrier consigned to the factor is sufficient."

CHAPTER 11.

BROKERS.

Sec. 81. DEFINITION. A broker is one whose business is to bring parties together to contract, or in their name, to contract for them, in some line of business.

A broker makes it his business to bring parties together to contract, or to make contracts for them. Thus a real estate broker makes it his business to find buyers for sellers and sellers for buyers of real estate. He may in one case simply bring the parties together leaving them to make their own contract, or in another case he may have the larger authority to bind one of them by a contract executed by himself as an agent.

A broker, unlike a factor, does not usually have possession of the goods. His authority is not so broad, and his contracts are generally made in the name of his principal.

Sec. 82. KINDS OF BROKERS. A broker usually chooses some one line of trade in which to carry on his business, and he is described in reference to that trade.

There are many sorts of brokers. The common sorts are here briefly discussed.

(1) *Real Estate Brokers.* A real estate broker brings buyers and sellers of real estate together or makes contracts for them. This is a very numerous class, and their general activities are commonly

understood. A real estate broker has no authority to contract for the purchase or sale of real estate or to buy or sell real estate, except as this authority is specially conferred. Often he does not execute the contract himself. He writes up a contract and has the owner sign it and then takes it to the buyer for his signature, or vice versa. So when a deed is given, the broker's name may not at all appear. Yet in many cases, a power of attorney is conferred on the broker to sign contracts and execute deeds. In reference to the subject of the broker's fees, see, *post*, in this chapter.

Real estate brokers often collect rents, procure insurance, and otherwise concern themselves with the management of real estate.

(2) *Insurance Brokers.* An insurance broker is one who makes it his business to secure insurance, for those who employ him, from various companies. He differs from an insurance *agent* who works for and represents a certain, or perhaps several, insurance companies, while the broker is the agent of the insured rather than of the insurer. He does not have as broad authority as a general insurance agent, who may bind the company. A policy is secured by him from the company, rather than executed by him for the company. Consequently there is not usually any act which he can do in signing policies, waiving or inserting provisions therein which can bind the company, although a general insurance agent would have such powers.

(3) *Merchandise Brokers.* A merchandise broker is one who represents buyers and sellers of merchandise without having possession of it. He usually deals in some one line and is described and known in reference to that line, as for instance, a cotton

broker, a sugar broker, a tea and coffee broker, a grain broker. He does not have the authority of a factor from whom he essentially differs in not having the possession of the goods.

(4) *Stock Brokers.* A stock broker buys and sells stocks of corporations for customers. He often differs from the other kinds of brokers and comes to have more the character of a factor. He often has possession of the stock, and buys and sells in his own name. A common practice is for him to sell stock on margin. In that case the buyer becomes the owner of the stock, which is bought by money loaned by him to the customer and the customer's own money in proportions usually of about 90 per cent and 10 per cent. The amount put up by the customer is said to be put up on margin.

Sec. 83. THE AUTHORITY OF THE BROKER. The broker usually acts in each instance upon a special authority and has very little implied authority to bind his principal.

A broker does not have possession of the subject matter of the contract as in the case of a factor. His authority is specially conferred and therefore limited. For instance, if one deals with a real estate broker he cannot usually assume that the broker's authority is extensive. He must look to the actual authority that has been expressly conferred. Thus C cannot assume that A, a real estate broker, has any authority to sell B's land. He may take A's word for it, but he is not really protected except upon B's word to that effect, which he should have in writing. Many times indeed a broker has no actual authority but simply brings parties together, whereupon they arrive at their own terms.

Where a broker has actual authority, it is usually to be construed in the light of customs and usages which are of universal use in that locality and trade. If one goes by means of his broker into a market or exchange he usually must be taken to have instructed the broker to proceed in respect to the well known customs and rules that prevail there, and he will be bound by these. This is perhaps more true of stock brokers than of other kinds, because it is their business which is so largely governed by customs, usages and rules.

A broker usually has no authority to receive payment, or to extend credit, as the factor may. In any particular case, however, this authority might appear either expressly or from the circumstances.

Sec. 84. BROKER MUST USE GOOD FAITH. A broker must not secretly represent both parties, nor secretly buy from or sell to himself, or in any way oppose his own interests to those of his principal.

What we have said in general of the agent's duty, applies here as elsewhere. Perhaps the temptation to violate that duty is found more often in the case of the broker than of other agents. Certain it is that many of the cases found in the reports of the secret receiving of double commissions, or the secret representing of other parties, are cases of brokers. Where a broker violates his duties in this respect he loses his right to commissions and the transaction is voidable if the third party is also in connivance.

Sec. 85. THE BROKER'S COMPENSATION. A broker is usually employed on commission. He earns his fee when he performs his engagement.

A broker is usually employed upon a contingent fee. Whether he has earned his fee or not depends on the terms of his employment. A broker may be employed to sell upon certain terms, or he may not have authority to propose any terms, but simply undertakes to find a buyer or purchaser. Thus P, who desires to sell a piece of real estate, may ask A to secure a purchaser for him. A finds that C is desiring to buy a lot in that vicinity, and C expresses himself as willing to buy P's lot if satisfactory terms can be arranged. So far A has earned no fee. If P sees fit to withdraw or if P and C cannot agree on terms, A cannot complain, because he was never empowered to submit any certain terms. If, however, P does sell to C, whom A has secured, A is entitled to a commission, although P may have carried on all the negotiations himself and dispensed with A's services in order to deprive A of his fee. If, on the other hand, P employs A to find a purchaser to buy on certain terms and A finds a purchaser who is willing to buy on those terms, then inasmuch as A has done his part, he is entitled to his fee whether P enters into a contract with C, or refuses to do so. But even in this case, P might revoke A's authority at any time before he finds the purchaser, without becoming liable to A unless P and A had contracted for a certain definite period. Merely naming a definite period is not sufficient to constitute a valid contract. There must be a consideration to support the agreement. Even then there may be revocation, but if that revocation is a breach of contract, the broker would be entitled to damages.

One who has employed a broker for a definite or indefinite period may sell during the meantime through another broker, or make a sale himself to

one not secured by such broker without liability unless he has given the broker an exclusive agency. Where he does make such sale through another broker or through his own efforts, this operates in itself to revoke the first broker's authority.

CHAPTER 12.

AUCTIONEERS.

Sec. 86. AUCTIONEER DEFINED. An auctioneer is an agent who makes it his business to represent owners of property in selling the same to the highest and best bidder among those who attend the sale.

Property is said to be auctioned when it is offered to the one who shall by his bid make himself the most desirable purchaser. Usually this would simply mean that he should bid more than anyone else. But if the sale was upon credit, it might also mean that he should qualify as one of fair credit. Customarily, therefore, it is announced that sales will be to the "highest and best bidder."

An auctioneer pursues a public calling. He makes it his business to represent any one who will employ him to sell the line of goods he handles, or perhaps any sort of property, whatever.

Auctions are usually public. An auctioneer is often defined as one who sells at public sale. Yet he might sell at private sale where there were two or more of a selected group who desired to buy. In such a case he would seem still to be pursuing the calling of an auctioneer. But his business as a whole is a public one. For this reason it is often required that he secure a license before he shall be entitled to act as auctioneer.

An auctioneer is agent of the seller, except in the matter of making book entries, etc., in which case he

is agent for both. That is, he is the seller's agent and he is not the buyer's agent except for clerical purposes. This might be important from the standpoint of the statute of frauds requiring a signed memorandum in writing in order to make a sale enforceable, which is in force in many states. The entry of the sale in the books with the buyer's and seller's names would be a memorandum made and signed by the buyer and seller because made by their agent.

Sec. 87. THE AUCTIONEER'S AUTHORITY. An auctioneer has no authority to sell except upon the terms given by the owner. He cannot warrant except with actual authority.

The terms upon which the sale at auction is to be made are openly stated by the owner or by the auctioneer with the owner's sanction. The auctioneer cannot transcend his authority thus given.

An auctioneer has no authority to warrant unless the owner actually gives him such authority.

Sec. 88. WHEN THE SALE BY AUCTION TAKES PLACE. A sale by auction is complete when the auctioneer signifies his acceptance of the bid. Unless a sale is "without reserve" (and even then in some jurisdictions), he may refuse any bid and withdraw the article from sale.

If an auction is not advertised to be without reserve, an auctioneer may withdraw the property from the sale at any time; for there is no contract made until the auctioneer accepts the bid. A, as auctioneer puts up a horse for sale, B offers $50, C, $55, and D, $60, for it; but until A signifies his acceptance to the

bid no contract is complete; no sale or contract of sale has been made. Consequently, neither B, C, nor D, may complain in such a case. However, the owner of the property might have just cause for holding A liable for refusing a bid he might have accepted and thereby losing the sale. But in some states (and the Uniform Sales Act so provides) if an auction is advertised to be "without reserve," the article cannot be drawn from sale after an offer has been made which comes within the terms of sale.

Sec. 89. "BY BIDDING." This consists in secret bidding by the owner or his agent in order to puff the price. It is illegal and a sale so induced is voidable. But an owner may openly bid for this only amounts to withdrawing the former bid, unless the sale was without reserve in those states where auctions without reserve prevent withdrawal.

Secret "by bidding" is fraudulent. If one discovers that his bid was induced because of a bid made apparently by a would-be buyer, but in reality by the owner or his agents, he may have the sale set aside. But an owner can always bid openly unless restrained by the announcement that the sale is without reserve, as discussed in the last section.

PART IV.

TERMINATION OF AUTHORITY.

CHAPTER 13.

TERMINATION BY ACT OF THE PARTIES.

Sec. 90. BY TERMS OF ORIGINAL AGREEMENT. Where the authority is stated to be for a limited period, the passing of the term terminates the agency.

If one is employed as agent for a certain time, the passing of that time terminates his authority. The parties may of course stipulate for a continuance and this might be shown by circumstances.

Sec. 91. BY ACCOMPLISHMENT OF OBJECT. If the object of the agency is accomplished, the agency ceases.

If one is employed to do a certain act, as to sell a piece of real estate, his authority then ceases when the act is done.

Sec. 92. REVOCATION BY ACT OF PRINCIPAL. Unless an agency is coupled with an interest in the agent it may be revoked at any time by the principal, though he have no right to revoke.

Agencies may be divided into those which are revocable and those which are irrevocable. In considering whether an agency is revocable, we do not consider the *right* of revocation; we consider only

the *power*, which is quite without respect to the right to revoke. I may revoke an agency whether I have any right to do so or not, just the same as I may discharge an employee, regardless of my right to do so. In such a case I may have to pay damages, but I cannot be compelled against my will to keep any certain person in my employ. But all agencies are not revocable. If the agent has an interest in the agency so that the agency must continue in order to protect that interest, the principal cannot revoke it. What constitutes an irrevocable agency is further considered in the following section.

Sec. 93. IRREVOCABLE AGENCIES. If an agency is coupled with an interest it cannot be revoked by the principal. It is coupled with an interest only when the agent has some interest or estate in the subject matter of the agency.

An agency is irrevocable when the agent has an estate or interest in the subject matter of the agency. His interest in the agency itself, no matter how extensive it may be, is not sufficient to prevent even its wrongful termination. But if besides that interest, he has an interest in the thing itself, his agency can no more be revoked than any property can be taken from a man without his consent. Thus if the agency must continue in order to reimburse the agent for expenditures made by him, or loans made by him to the principal or others, the agency is irrevocable. Thus if A should loan P $1,000, and as a security for the loan should be given by P the authority to collect certain debts, P could not deprive A of this security by revoking the agency. But if P should employ A to sell land on commission, he could revoke the

authority at any time, even though thereby depriving A of his fees, for A could have his damages and this right is as great a protection to him as though the agency had continued.

If an agency is stated to be "irrevocable," it may nevertheless be revoked, unless coupled with an interest. But of course if there is no right to revoke it, its revocation will give rise to an action for damages.

Sec. 94. WHEN PRINCIPAL HAS RIGHT TO REVOKE. A principal has the right as well as the power to revoke whenever the agency is for an indefinite period or without consideration, or where the agent has on his part broken his contract, or where it is in terms revocable.

If the agency is for an indefinite period it may be brought to a close at any time by either principal or agent; so even if a time is definitely stated, still if there is no consideration for its continuance it could be revoked at any time. Thus if the agent did not promise and so could not be held to do anything during such term, but had in substance or in terms agreed to act as he might see fit or desired, there would not be any contract for any definite period though the authority might so state. Sometimes an authority is given upon condition that it may be terminated at any time, or upon the happening of a certain contingency, or upon a certain notice to be given.

If the agent breaks his contract in any material way the principal may thereupon terminate the agency, or waiving the breach he may continue the agent in the agency. After he has once waived the

breach, he could not afterwards rely on it as an excuse for terminating the agency.

If an agent turns out to have less competency than the principal was justified in supposing he had, the principal may revoke the agency. Professional agents especially hold themselves out as having a certain degree of skill, and if they are wanting in that respect they need not be retained.

Sec. 95. TERMINATION BY AGENT. An agent has the power, whether or not he have the right, to terminate the agency at any time. His right to terminate depends upon the same reasoning that governs the principal's right to terminate.

An agent has always the power to terminate the agency. But he may not have the right. That depends upon his contract and upon his principal's breach thereof. Agencies at will, or for an indefinite period, or for a definite period but without consideration, could be terminated by the agent at any time, just as they can by the principal.

Sec. 96. NOTICE OF REVOCATION TO AGENT. The principal must notify the agent when he revokes and usually the revocation consists in such notice.

An agent is entitled to notice when his authority is revoked. Usually the notice itself would constitute the revocation.

Sec. 97. NOTICE TO THIRD PERSONS. Where the agency is general, revocation does not usually operate as to third persons except upon notice to them, but no notice is usually necessary in special agencies, except where negotiations are actually being entered into thereunder.

Third persons who would under the circumstances be justified in dealing with an agent under the belief that his agency continued to exist are entitled to notice. Notice might be given them by the circumstances, as where an agent has been put out of possession of the office and others are in his place. Notice would seldom be required except in general agencies.

CHAPTER 14.

REVOCATION BY OPERATION OF LAW.

Sec. 98. BY DEATH OF PRINCIPAL. The death of the principal terminates the agency, except when the agency is coupled with an interest. This is true though the death is unknown when the contract was attempted to be made.

Agency, as we have seen, is a personal relation and is entered into subject to the continued existence of the principal and agent. If the principal dies, the agency is thereby terminated. The estate or the heirs cannot claim a continuance of the agent's services.

If however the agency is coupled with an interest, as we have seen, it is irrevocable. There death of the principal does not terminate it for the same reasons that protect the agent in an attempted revocation by the principal.

Sec. 99. BY DEATH OF AGENT. The death of the agent terminates the agency except where the agency is coupled with an interest.

If the agent dies, the agency is terminated. The personal representative or the heirs cannot step in his place. If the agency is coupled with an interest, it may be carried out by the personal representatives for the benefit of the estate.

Sec. 100. BY INSANITY OF ONE OF THE PARTIES. Insanity of either principal or agent terminates the agency, except when coupled with an interest.

The insanity of one of the parties removes his qualifications to act as principal or agent, except when coupled with an interest.

Sec. 101. BY BANKRUPTCY. Bankruptcy will not in itself necessarily terminate an agency. If it so operates upon the subject matter thereof that it removes the purpose of the agency, the agency will be terminated.

Bankruptcy usually does not affect one's merely executory contracts. It does not necessarily affect the relation of principal and agent, especially if the bankruptcy be that of the agent.

Sec. 102. BY WAR. War between the country of the principal and of the agent operates to dissolve the agency.

Where the countries of the principal and agent are engaged in war, the agency, generally speaking, is at an end.

APPENDIX A.

FORMS IN AGENCY.

APPENDIX A.

FORMS IN AGENCY.

1. Power of Attorney.

KNOW ALL MEN BY THESE PRESENTS, That I, James X. Showalter of the City of Chicago, County of Cook, in the State of Illinois, have made, constituted and appointed, and *By These Presents* do make, constitute and appoint Frank O. Hazard, of the City of Peoria, County of Peoria and State of Illinois, my true and lawful Attorney for me and in my name, place and stead, to grant, bargain, sell, release, convey, transfer, exchange, mortgage and lease any and all lands, tenements, hereditaments, real and personal property, which I may own or hereafter acquire, possess or be to any extent entitled to or interested in, upon such terms and conditions and under such covenants as he shall see fit and for such consideration as he shall deem advisable; and for me and in my name to sign, seal, execute, acknowledge and deliver all such deeds, leases, bills of sale, and assignments, indentures, agreements, mortgages and deeds of trusts or any other instrument necessary or desirable to accomplish any of the purposes for which this power of attorney is given, giving and granting unto Frank O. Hazard, my said Attorney, full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming all that my said Attorney or his substitute shall lawfully do or cause to be done by virtue hereof.

In Testimony Whereof, I have hereunto set my hand and seal this 6th day of January, 1912.

Signed, Sealed and Delivered in Presence of
JAMES R. SMITH,
WILLIAM ODELL.

JAMES X. SHOWALTER (*Seal*)

COUNTY OF COOK. }
STATE OF ILLINOIS, } *ss.*

I, Herbert Jones, a Notary Public, in and for, and residing in the said County in the State aforesaid, *Do Hereby Certify*, that James X. Showalter, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said Instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal, the 6th day of January, A. D., 1912.

(*Notarial Seal*) HERBERT JONES.
Notary Public.

(*Note*: The above is a very general power of attorney giving authority to dispose of or contract in reference to the lands of the principal. A power of attorney might only cover the very thing expected to be done, as to sell certain land, described in the power of attorney, at certain prices or upon certain terms therein named. A power of attorney giving authority to sell or dispose of real estate is recorded in the same manner as deeds are recorded. But powers of attorney which are used as the evidence of one's authority to do things which are not matters of record, are themselves, of course, not recorded.)

2. Appointment of Agent to Collect.

I, James A. Jones, hereby empower until further notice, John M. Smith, as my agent to collect all rents due or to become due me from all my tenants in any of the buildings owned by me in the City of Chicago; said rents may be paid to said Smith, either before or after they are due; but said Smith has no power to compromise any claims or give any releases or receipts which shall operate to discharge any claims or rights except in full payment for the same. And the said Smith has no power to enter into any new leases, compromises or contracts of any sort in my behalf other than hereby given.

JAMES A. JONES.

(*Note*: Some evidence of this sort might be desirable for presentation to the tenants, in order to set at rest the question of the agents authority. Or the landlord might simply notify his tenants to pay their rent to the agent. Agents who go about to make collections upon goods sold or upon notes, etc., find some sort of identification or letter of authority necessary; which might consist in receipts signed by the principal to be filled in by the agent and used by him as required; or a brief statement of authority. It is of course more material that the agent's actual authority be required in cases where money or goods are parted with than where a merely executory agreement is made in the name of the principal; as where I agree to purchase books of a book agent, signing a subscription blank which is of no use except as it comes into the possession of the principal and I am not bound upon it except to such principal, and if the agent lacks authority I am not bound. But if the agent demands a payment, I must know his authority to receive payments. Besides the evidence of the authority which the agent may find need for, there would be the contract of agency, made orally in writing, whereby his compensation, the term of his employment, his duties, etc., are provided for.)

APPENDIX B.

QUESTIONS AND PROBLEMS IN AGENCY.

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QUESTIONS AND PROBLEMS IN AGENCY.

said (C. D.) marries said (E. F.) to pay said (A. B.) $2,500.

Signed, sealed and delivered this 13th day of July, A. D., 1896.

(A. B.).
(C. D.)."

(A. B. afterwards introduced C. D. to E. F. and C. D. married E. F. A. B. brings suit, can he recover? Why? Hellen v. Anderson, 83 Ill. App. 506.)

12. What is a minor's implied authority to bind his parent?

13. What is a wife's implied authority to bind her husband? Define her authority as implied in law, and such authority as may be implied in fact.

CHAPTER 4.

14. Define the term ratification.

15. A. in his own name and without representing himself to be an agent, entered into a contract with C. A. thought he was acting in behalf of P., though in reality his authority from P. was not extensive enough to cover the act in question. C., now discovering P.'s relationship, claims that P. ratified A.'s act. Discuss.

16. Can one ratify a forgery?

17. A. was appointed by P. to sell bonds for him. A. sold the bonds by means of fraud and deceit. P. knowing the facts, received and retained the money arising from the sale. Is he liable for the fraud and deceit?

18. A corporation having unissued shares of stock appointed A., its agent, to sell the stock. A. made fraudulent statements in reference to the corporation and the stock. The corporation received the money arising from the sale without knowledge of the fraud. Afterwards it was informed of the fraud. It refused, however, to return the money. Does it thereby ratify A.'s fraud?

19. What is the rule about ratifying a contract in part and repudiating it in part?

20. Where one ratifies with full knowledge of the facts, can he afterwards repudiate the agreement?

CHAPTER 5.

21. A. was a real estate broker. P., owning a certain lot of land, wrote to A., advising him that he would sell the land if A. could find him a purchaser who would purchase upon satisfactory terms. A. produced C. who was willing to buy the land for cash at its reasonable value. P. refused to sell the land. On the facts stated has A. earned any commission?

22. P. employed A. to secure a purchase for his land at $5,000 cash. A. produced C. who offered to purchase for such price and was willing, able and ready to buy. P. refused to sell. Has A. any right against P. for commissions?

23. P. employed A. as his agent for one year. At the expiration of one month P. discharged A. without cause. State A.'s rights.

24. A. was employed by P. to work for him one month. At the end of two weeks A. having given satisfactory service to that time, quit to take a better position. Assuming that P. did not consent to the termination, has A. any rights against P. for compensation?

CHAPTER 6.

25. State the fundamental rule in respect to the duty which an agent owes to his principal.

26. P. employed A. to sell his land for not less than $5,000, at a commission of 2½ per cent. A. consulted with C. who informed A. that if P. could be induced to sell the land for $4,800 he, C., would give A., $100. A. induced P. to sell for this sum and A. collected his commission from P., and the $100 from C. P. afterwards learned of A.'s secret arrangement. Suppose (1) that he seeks to set aside the transaction, agreeing to return C. the purchase price and A. his commission; (2) that he sues A. for the commission paid him. What are his rights in both cases?

27. What is the duty of the agent in respect to obeying his principal's instructions?

28. What degree of care and skill must the agent use?

29. A. in Chicago deposits for collection with the P. Bank of Chicago, a check drawn upon a Seattle bank. The P. bank sends the note to a Seattle bank which by its negligence in presenting the check, causes loss. May A. hold the P. bank? Why?

CHAPTER 7.

30. A. asserts to C., that he is P.'s agent. C. thereupon deals with A. as agent of P. A. is not P.'s agent, though A. wrongfully construing a letter, supposed he was. P. refuses to ratify A.'s act and C. cannot hold P. Has C. any remedy for his damages?

31. State the form of signature an agent ought always to use if he desires to be sure of not binding himself.

32. Is an agent liable for torts committed by him in behalf of his principal?

CHAPTER 8.

33. What is an "undisclosed principal"? Is he liable upon contracts made in his behalf? State the rule.

34. State the various exceptions to the rule that an undisclosed principal may be held.

35. When is a third person bound to elect whether he will hold the undisclosed principal or the agent.

36. May one safely rely upon assertions made by an agent in respect to his authority? Why?

37. State the general rule in reference to the apparent authority of agents.

38. A. was the general manager of the P. Hotel Co. He was deprived very largely of his real power to represent the company, but was allowed to continue in his seeming former position, keeping the same private office,

giving orders to clerks, etc. He employed a private detective to watch parties in the hotel. The detective put in his bill for services. Is the hotel bound? Grand Pac. Hotel Co. v. Pinkerton, 217 Ill. 61.

39. P. employed A. to collect two notes made by C. Instead of collecting the first note, A. made an agreement for its extension. Is P. bound to recognize this agreement? A. collected the second note in the form of a check made by C. to the order of P. A. took the check to the bank and upon showing that he had orders from P. to collect the note, thereby obtained the cash from the bank and then absconded. P. now sues the bank. Can he recover?

40. When will the admissions of an agent bind his principal?

41. When is notice to an agent, notice to the principal?

44. State the rule in reference to the principal's liability for his agent's torts.

CHAPTER 9.

45. State the liability of the third person to an undisclosed principal. What are the exceptions to this rule? C. makes a contract with A. whereby C. agrees to work for A. a period of six months. A. is really representing P., an undisclosed principal in employing C. P. attempts to step in and take A.'s place. Must C. recognize P. Why?

CHAPTER 10.

46. Define a factor. How does a factor differ from a broker? Is a factor's authority broad or narrow? Why? State the authority of a factor, to sell, to give credit, etc.

47. What is the factor's authority to pledge?

CHAPTER 11.

48. When is an agent called a broker? Name various kinds of brokers.

49. State in a general way the authority of a broker.

CHAPTER 12.

50. Define an auctioneer.

51. What is the auctioneer's apparent authority?

52. When does a sale by auction take place? After a bid has been made, is the auctioneer bound to recognize it if there is no higher bid? May an owner himself bid upon the thing auctioned?

CHAPTER 13.

53. Name the various ways in which an agency may be terminated.

54. May a principal terminate an agency where he has no right to do so? May an agent terminate the agency where he thereby violates his agreement?

55. What is an "irrevocable agency". P. borrows money from A. and to secure the loan authorizes A. to collect money due to P. from various parties. A. makes the loan solely upon this understanding. Can P. revoke the agency before it expires by its own terms? Why? P. appoints A. his agent to collect certain claims, on a commission of 20 per cent. Can he revoke this agency before A. has had an opportunity to collect the claims?

56. P. appointed A. his proxy to vote stock for him in the X. corporation, and in terms stated that the proxy was irrevocable. Before the corporate meeting P. attempted to revoke the proxy. May he do so? Assume that the agency is not coupled with an interest?

CHAPTER 14.

57. State the various events which will revoke an agency by operation of the law, explaining each.

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BOOK II.

THE LAW OF PARTNERSHIP

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THE LAW OF PARTNERSHIP

PART I.

GENERAL NATURE AND FORMATION OF PARTNERSHIPS.

CHAPTER 1.

THE GENERAL NATURE OF PARTNERSHIP.

Sec. 1. DEFINITION. "A partnership or firm is an association composed of two or more persons formed for the purpose of carrying on, as co-owners, a business with a view to profit." (Sec. 8 of Draft of an Act to make uniform the Law of Partnership).

The fundamental nature of a partnership is perhaps quite generally understood among business men. Its common existence as a vehicle of commerce would indicate this. But the rights and duties of partners, the extent to which one may bind the other, and such matters, probably suggest many questions which the average business man could answer only in the most general way. In some respects the law of partnership is perhaps not quite so important as in the days when the incorporation of business was not so frequent and common. Yet carrying on business by partnerships is now, and will probably always be, very extensively done, and every man in business is called

upon constantly to act in reference to partnership matters.

To get before us clearly at the very beginning a proper understanding of the nature of a partnership let us take a simple example.

Suppose that Jones is the owner of a retail grocery business. He decides to increase his business. He may undertake to bring this about through incorporation. In that event the business would pass, theoretically, into the ownership of the corporation formed, and those who had capital invested would become stockholders or bondholders. He decides, however, not to incorporate, but to maintain his individual ownership. Brown is a practical grocer. Jones can secure him as manager on a salary of $5,000 a year, or he can admit Brown as a part owner in the business. Smith is a man with capital. Jones can borrow $5,000 from Smith or he can admit Smith as a part owner in the business. The three, however, agree to carry on the grocery business as mutual or common owners, for the purpose of making a financial profit, but realizing that if the venture fails each must bear a share of the loss.[1] The firm begins business as Jones, Brown & Smith. Jones contributes his stock on hand and the good will of his business, and his time; Brown agrees to give his time; and Smith contributes a certain amount of money. Each is a co-owner of the entire business. A partnership has been formed.

1. **If between the members of a business owned by them and carried on for their mutual profit, there is an agreement that certain ones of them shall be protected against loss, the concern is still a partnership, and such protected parties are still liable to third persons.**

Sec. 2. PARTNERSHIPS MUST BE FOR FINANCIAL PROFIT. Where parties combine for purpose other than those of mutual profit, no partnership exists. But on the other hand joint interest in profits is not enough to create partnership.

If A, B, C and D form a club for pleasure purposes, or a society for research, or a labor union, or any combination which does not directly contemplate mutual profit of a financial nature, no partnership results. This is important as bearing upon the apparent authority of each member to represent the other members. In such club, society or union, the authority of each member to represent the society, even as to things in the ordinary and regular line of endeavor, must be shown by something more than the fact of mere membership. In The A Boating Club (unincorporated) of 100 members, the steward is given by the by-laws authority to buy a certain amount of supplies. M, another member, cannot bind any other members in buying such supplies except as they authorize him or ratify his act, and then he can bind only such members as do this and not the others.

But though a partnership can result only where there is a joint interest in the profits, still joint interest in profits is not enough to establish a partnership. There must be the further element of mutual ownership. This is shown in sections 5, 6 and 7.

Clubs, societies, etc., may be incorporated, if the members desire, for it is not necessary that a corporation be organized for purposes of profit.

Sec. 3. DOCTRINE OF DELECTUS PERSONAE. Each partner enters the partnership relation on a strictly personal basis. No person will be made a partner

with any other person without his consent, and he is entitled to a continuance of the relation on the part of each partner.

Participation in a partnership is permitted on a purely personal basis. The law will not make A a partner with B except upon the contract and consent of both. The relationship is highly confidential. A may be willing to be a partner with B, but not with C. Consequently B cannot by sale to C change the firm from that of A and B to that of A and C without A's consent. For this reason shares in a partnership are not transferable without consent. Sometimes the form of the agreement permits transfer of shares as in a joint stock company. In that case the partner consents to a transfer of shares. So death of a partner dissolves the partnership and does not admit the heirs or personal representatives as partners.

But the doctrine goes still further. If A forms a partnership with B and C he cannot be made a partner with either of them alone without his consent. He may be willing to be in the partnership of A, B and C when he would be unwilling to carry on the relationship with either B or C alone. Consequently A can insist on a dissolution if either B or C withdraws without his consent.

In the law of corporations no such doctrine applies. One purpose of incorporation is to permit free and ready transfer of shares.

Sec. 4. HOW PARTNERSHIP DIFFERS FROM CORPORATION.[2] A corporation is an artificial person.

2. See Volume 5. The Law of Private Business Corporations, in this Series.

It exists separate and apart from the members who compose it But a partnership is not an entity. It is a relationship.

A corporation is essentially different from a partnership. Some differences are stated below:

(1) The corporation derives its existence from its charter, or letters patent from the State. The partnership arises out of a contract made without any special permission of the state.

(2) The corporation is an *artificial person.* The partnership is a *relationship* between two or more natural persons.

(3) The corporation must act as an individual by its properly authorized agents, and must sue and be sued, buy and sell, and otherwise contract, in its corporate capacity and name. The partnership must act as a combination of persons, and while in many cases the act may be in the partnership name, that name is merely a fictitious name of the parties who compose the firm.

(4) The shares of a corporation are transferable, while those of a partnership are not so except upon permission of the other members.

(5) Death of a partner dissolves the firm. Death of a member of a corporation has no effect upon the corporation's existence.

(6) Each partner is an agent of the partnership. The members of a corporation are not agents thereof by reason of that fact alone.

(7) The liability of stockholders is usually limited to payment of the amount of the shares to which they have subscribed. Partners are liable for all debts regularly contracted by the firm.

Sec. 5. HOW PARTNERSHIP DIFFERS FROM RELATION OF EMPLOYER AND EMPLOYEE OR PRINCIPAL AND AGENT. Partners are mutual owners. An employee or an agent, though his reimbursement may consist in a certain percentage of the profits, has no ownership in the business.

Usually it is not difficult to tell whether one is a mere employee or a partner. But there are cases where the solution involves some difficulty. Those are cases in which the employee's compensation is to consist in a certain percentage of the profits. The mere right to share profits does not make one a partner. One must be really a mutual owner, and be liable to expenses and subject to losses. Thus A has a grocery store on Main street. He has other interests which require his attention, and so informs B that if B will manage and conduct the Main street store he will give him 50 per cent of whatever is made above expenses. This does not make B a partner, and B is not liable to creditors unless he has permitted them to think he is a partner. One can readily see that the agreement might have been so loosely made that it would be hard to tell whether A meant to take B as a partner or as an agent.

Sec. 6. HOW PARTNERSHIP DIFFERS FROM RELATION OF LENDER AND BORROWER. One who loans money for investment in a business does not thereby become an owner in the business and therefore is not a partner. Basing the amount of interest on a percentage of the profits does not in itself deprive the transaction of its character as a loan.

If A loans money to B that B may put it in a business the loan does not make the lender a partner. He

has no ownership in the business by virtue of the loan. He is to be paid back at all events; that is, whether the business succeeds or fails; he is not liable for the debts of the concern. Sometimes a loan is made not for any fixed rate of interest, but for a percentage of the profits of the business. If in such a case it still has all the characteristics of a loan and is to be paid back at all events, and there is no intention to give the lender an ownership in the business, such lender does not become a partner.[3]

Sec. 7. HOW PARTNERSHIP DIFFERS FROM RELATION OF LANDLORD AND TENANT. A landlord has no ownership in the business of the tenant conducted on the premises, and is therefore not a partner. A mere agreement to take shares of a crop or a certain percentage of profits for use of property does not make one a partner.

If one rents a farm agreeing to pay his rent by a certain division of the crops raised, the owner of the farm is still a landlord, and there is no partnership created. So if one in hope of a larger reward does not stipulate for a fixed rental, but for a certain percentage of the profits in the business to be carried on, this gives him no ownership in the business and the owner of the premises is not a partner. Yet under the facts it might be quite difficult to tell what the intention of the parties was. One who is a partner

3. Such contracts may, however, be usurious. But that is another question. The loan of money at usurious rates does not make the lender a partner. Eastman v. Clarke, 53 New Hampshire Reports, 276; Richardson v. Hughitt, 76 New York, 55.

can furnish, as his capital, or as a part thereof, the use of the premises, and the fact that he did furnish them would not make him a landlord, if as a fact it was understood he was to be really a part owner—that is a partner.

Sec. 8. PARTNERSHIP AS TO THIRD PERSONS. Parties may be held as partners as to third persons when they are not such as between themselves, but in most jurisdictions they will not be so held unless, by permitting others to deal with them as partners, they have become estopped to deny the relationship.

It was laid down in the earlier cases that if one shares in the profits of a business he must also be liable for the losses, if losses occur. In other words, from the mere fact that he shares profits he becomes a partner so far as the rights of third persons are concerned.[4] But this doctrine has been repudiated in the best considered cases and the better view is that mere sharing of profits will not make one a partner as to third persons.[5] There must be such a set of facts that the third party was justified in inferring from them that a partnership did really exist between the parties and under his inference treated with the parties as partners. In that case an estoppel arises. One cannot say he was not a partner as to one who in justifiable reliance under the facts thought he was securing rights against such person as a partner. Thus if A allows B to use his name as a partner and to publish to the world that there is a firm composed

4. Grace v. Smith, 2 Wm. Blackstone, 998; Waugh v. Carver, 2 H. Blackstone, 235.

5. Cox v. Hickman, 8 House of Lords Cases, 268.

of A and B, C, who deals with B, under the impression that he is dealing with the firm of A and B, can afterwards assert such right against A as he could have asserted had there been an actual partnership between A and B. This is a *partnership by estoppel.*

Sec. 9. THE TRUE TEST OF A PARTNERSHIP. Parties engaged in business will be held as partners among themselves when it was their intention to have a mutual ownership in the business. As to others, they will be held partners when they have permitted this to seem their intention, and the others have acted in reliance thereon.

Whether there is a joint interest in the profits is important only in raising a presumption that there is a partnership. But the true test which must finally be applied in disputed cases is the evident intention of the parties. As between the parties themselves, their actual intention governs, just as between principal and agent the actual authority is what must be considered. And, just as in the law of Principal and Agent we allow an agent to bind the principal upon the apparent authority wherewith the principal has clothed the agent, so in the law of partnership those are partners as to third persons who have permitted those third persons to believe it was their intention to mutually own the business.[6]

Sec. 10. PARTNERS MUTUAL AGENTS. Each partner is an agent of all the others in respect to regular partnership transactions, and binds himself and them whenever he purports to act as partner in regular partnership dealings.

6. Cox v. Hickman, *supra.*

Partnership is in reality a branch of the law of Agency. Out of the fact that agents are mutual owners arises the result that they are mutual agents. Each partner, as mutual owner, may bind himself and has authority to bind his partners.

It is true by agreement this power in any case may be curtailed. That, however, would not affect third persons who did not know of the agreement.

The implied power of the partner to bind the firm does not extend to anything irregular or unusual. Its exact scope is taken up at length hereafter.

Sec. 11. KINDS OF PARTNERSHIPS. Partnerships are broadly divided into general and special partnerships, into trading and non-trading partnerships, and into unlimited and limited partnerships.

A general partnership is a partnership in some general line of business, as to conduct a retail store.

A special partnership is a partnership in some one particular enterprise.

A trading partnership is one which as its main activity buys and sells.

A non-trading partnership is one that does not as its main business buy and sell; but it must, of course, still be a combination for profit. Examples of non-trading partnerships are partnerships to practice law, to practice medicine, to farm, to conduct a laundry, a horseshoeing shop, etc., or any business whose main purpose is not to buy and sell.

The ordinary partnership is an *unlimited partnership*—that is, the liability of its members to creditors is not limited to any certain amount, whatever limitation may have been agreed on among the members as to liability of any one of them. Some states, how-

ever, have passed statutes which provide for the formation of limited partnerships. In such a case the articles must be recorded and published, and a number of formalities observed. Usually also, one of the partners, at least, must continue liable as a general partner. In that case the law provides that the other partners, known as *special partners,* are liable only to the amount subscribed by them.

These partnerships are not commonly formed. It is simpler to form a corporation and that usually attains the ends sought better than the formation of a statutory limited partnership.

Sec. 12. KINDS OF PARTNERS. Partners are known as Real, Ostensible, Active, Silent, Secret, and Dormant.

A *real* partner is one who is actually a partner. He may be ostensible or secret.

An *ostensible* partner is one who, whether actually a partner or not, seems to be a partner.

An *active* partner is one who takes part in the active management of the business.

A *silent* partner is one who takes no active part. He may be ostensible or secret.

A *secret* partner is one whose connection with the firm is concealed. He may be active or silent.

A *dormant* partner is one who is both secret and silent. But the term "dormant" is often used to donate the secret partner, although the derivation of the word, shows the meaning of inactivity.

Sec. 13. "SUB-PARTNERSHIPS." A Sub-partnership is held to exist where one partner has an arrangement with some person to share with him the profits

which that partner derives from the partnership. This does not make such person a member of the partnership and he cannot be held as a partner.

If A, B and C are partners, C may have some arrangement with D, whereby D is to share with C the profits made by C out of the partnership. This arrangement does not make D a member of the firm and he can have no voice in its management and cannot be made liable for its indebtedness. D is known as a "sub-partner."

CHAPTER 2.

FORM AND REQUISITES OF THE CONTRACT OF PARTSHIP.

Sec. 14. FORM REQUIRED. No particular form is required. The contract of partnership may be oral or in writing, in the absence of special statutory provisions.

While it is highly desirable that a partnership agreement be in writing, the agreement may be oral, unless some particular state statute requires a writing for some purpose.

The English "Statute of Frauds," re-enacted in the various American states, requires that contracts which by their terms are not to be performed within a year are not enforceable in the courts, unless there are some written memoranda to prove them, signed by the party sought to be charged. This has been held to apply to contracts of partnership.

Where the agreement is drawn up in a formal way it is called "The Articles of Partnership."

Sec. 15. THE ARTICLES OF PARTNERSHIP. These constitute the evidence of the contract between the parties. They are not binding on third persons without notice of them, and their provisions may be modified or waived by subsequent agreement or conduct.

It is desirable, in partnerships of any moment, that articles of partnership should be drawn with a good

deal of care and considerable detail. These articles constitute the evidence of the contract as between the parties in reference to the manner of conducting the partnership, the interests of the partners, etc. But the adoption of such articles in no way affects the *general duties* of partners toward each other, as, for example, to act in the utmost good faith.

What the partnership articles contain is usually of small concern to parties dealing with the partnership so long as they have no notice of restrictions therein imposed. They can usually assume that each partner has authority to bind the firm for its proper purposes. The articles of partnership are not a matter of public record like the charter of a corporation; except in cases of limited partnerships and the like, which are organized under some special statute requiring record. They differ also from the charter of a corporation in that they originate by mere agreement of the members and not by the act of the state, and may therefore be abandoned, waived, modified and enlarged at pleasure.

The partnership articles should contain provisions in reference to:

1. The names of the partners.
2. The name of the partnership and that it shall be used in all partnership transactions.
3. The nature of the business to be carred on.
4. When the partnership is to begin and what is to be its duration.
5. Where the partnership is to be carried on.
6. What each partner is to contribute, and in what form it shall be contributed by him, and at what time. Where other property than money is to be contributed, its valuation in money should be stated, and

it should be stated whether it is the *thing* or its *use* which is to be devoted to the partnership.

7. The interest which each partner is to have in the partnership; for otherwise it is presumed that the interests are equal, notwithstanding the contributions may have been unequal.

8. The duties of each partner.

9. When accountings shall be had; how much each partner shall be entitled to draw.

10. The keeping of partnership books.

11. Whether any partner is to receive a salary. But in the absence of any provision there would be no right to a salary. Each partner is presumed to depend upon the profits.

12. The right of a partner to retire, where it is desired that any one shall have that right without dissolving the firm; and how his interest shall be disposed of—that it shall be valued in a certain way, and shall be first offered to what parties, the notice to be given, etc.

13. The manner of dissolution. How the property shall be divided, etc.; the disposition of the good will.

14. How disputes are to be settled.

In every instance the special needs of each partnership must, of course, be considered. A general form of partnership articles is given in the Appendix.

Sec. 16. COMPETENCY OF PARTIES TO BE PARTNERS. The competency of parties to be partners depends on their competency to contract, as determined by the general rules governing contracts unless some local state statute varies these general rules.

A minor, having capacity to make a voidable contract, can enter into a partnership, but may disaffirm

his contract and withdraw at any time, as well as refuse to be held on contracts made by him as a partner.

A corporation cannot be a member of a partnership, though it may assume joint liability.

Sometimes a statute provides in reference to the capacity of a party to enter into a contract of partnership. Thus the law of Illinois says that a married woman cannot enter into a contract of partnership without the consent of her husbad.

Sec. 17. OFFER AND ACCEPTANCE. A contract of partnership, like any other contract, results from offer and acceptance, and while the parties may actually carry on from day to day a partnership under a loose general agreement, a court cannot enforce an executory agreement which is too general or vague to constitute a definite executory contract.

A partnership results from a contract, and in every contract there must be an offer made in definite terms and an acceptance of the offer without modification. It is of course true that parties may have a partnership in which the terms were never very definitely stated in express terms; but they may go on from day to day under a very general agreement and the terms might become fixed as to details after the partnership had actually begun operations. But an executory agreement of such a legal nature that the court could not say that it amounted to a definite contract would not be an enforceable agreement in the courts, in the sense that damages would be allowed for its discontinuance where good faith was observed.

Sec. 18. CONSIDERATION. A contract of partnership must be supported by a consideration. The mutual contributions or definite promises of each partner are a consideration to support the undertakings of the other partners.

A partner may give or promise to give his money or other property, his skill, his time, as his contribution to the firm capital. What each does or promises to do in reliance on what the other does or promises to do constitutes the consideration.

Sec. 19. LEGALITY OF OBJECT. Every partnership must have a legal object.

As every contract must have a legal object, it follows that where a partnership is formed to accomplish an illegal purpose, it is invalid and no rights can arise out of the partnership as such. A breach cannot be successfully averred in the courts and an accounting for profits cannot be had.

To be an illegal partnership the main purpose must be illegal. The fact that a partnership formed for proper purposes contemplates or does some illegal act, as the commission of a tort, has no effect to taint the whole concern with illegality. For the tort, damages could be had by the injured party, but neither partner could for that act alone insist that the partnership was illegal. The law permits one party to set up the defense of illegality as against the other, though both are equally guilty, not out of consideration for the defendant, but on grounds of public policy which forbids the enforcement of illegal agreements in the courts.

PART II.

FIRM NAME, CAPITAL AND PROPERTY.

CHAPTER 3.

THE FIRM NAME.

Sec. 20. NECESSITY OF FIRM NAME. It is not necessary, though highly desirable and usual, that the partnership should have a name.

It would be hardly possible for a partnership of any extent or duration to get along without a name; but such name cannot be said to be a legal necessity.

Sec. 21. WHAT FIRM NAME MAY CONSIST OF. The firm name may consist of any name chosen for that purpose. It need not contain the names of any of the partners and may be purely fanciful, and need not indicate, in the absence of statutory requirement, that the firm is unincorporated.

If there is no statute to the contrary, a firm name may be anything that the parties choose. It may contain the names of all the members or of part of them, or may be purely fanciful.

Statutes have been passed in some of the states relative to partnership names. Some of these provide for recording the names of the actual partners where the partnership name does not disclose who they are.

Sec. 22. EFFECT OF USE OF FIRM NAME. The firm name is assumed by all the partners, and its authorized use is in effect a use of the name of all the individual members. The firm name should in general be used in all firm transactions but should not be used in conveyances of real estate to or from the firm.

If a firm name has been adopted it should be used in the ordinary firm business. The use of such name will be the use of the name of all the partners, for it is the assumed or fictitious name which the partners have adopted. The use of such name will therefore bind them whenever the act done in such name is done under the apparent authority granted by the party sought to be bound. Thus, if A, of the firm of "United Tailors Association", has apparent power to issue a note to bind the firm and does so in the firm name, A, B, C and D, the members of such firm are liable upon the note because it is in their name —a fictitious name assumed by them.

But in real estate transactions, the name of all the members of the firm, as individuals, or of some individual in trust for the members, ought to be used. For the title of real estate is a matter of record and must exist in some entity which the law knows, that is, in a natural person or corporation. Title to real property cannot be vested in an unincorporated association, as a matter of record, for that association has no legal existence as an entity. It is only an association of persons. A deed to a partnership ought tc be to the members who compose it, or to some ot them.

In the case of a corporation, the corporate name ought to be used in every transaction.

Sec. 23. PROPERTY IN FIRM NAME. Use by the firm gives a property in the name which the court will protect.

If a firm adopts a name to which it has a right and by use thereof gives value to that name so that it really becomes an asset the court will not allow the use of that name by others who assume it for the purpose of getting the benefit of its value. The law of Unfair Competition, lately of very extensive development, prevents the use of a name by any one whose object is to thus attract trade to himself by use of the name of an established firm or article. Not only will the use of the same names, dressings, etc., be prevented; but also the use of similar names, etc., which tend to deceive, will be unlawful.

CHAPTER 4.

FIRM CAPITAL AND PROPERTY.

Sec. 24. DISTINCTION BETWEEN FIRM CAPITAL AND FIRM PROPERTY. The Capital of a partnership is the total amount of money represented by the agreed contributions of the members to the fund with which the concern is to do business. The property of a partnership consists in all the assets of the firm which it may have from day to day.

A firm may not be capitalized for any fixed amount, though probably this is usually the case. But in any event the capital is the aggregate of that fund which each agrees to contribute as his share. He may contribute it in land, goods, or money, as may have been agreed upon. In such case a money valuation should be placed upon it in order to determine its comparison with the capital contributed by the others.

When a thing is once contributed, as capital, it ceases to belong to the member who contributes it, and belongs to the firm as such, that is, each member of the firm acquires an interest in it. Upon the dissolution of the partnership the particular thing contributed cannot of right be demanded by the party who contributed it. If, however, he only contributed its *use*, he could have the thing again.

The firm's property includes all of its assets. These vary from day to day. The value of its property may at one day exceed its capitalization and at another be less than such capitalization.

Sec. 25. WHAT CONSTITUTES FIRM PROPERTY. Whatever is contributed to the firm by any partner or is acquired by it becomes firm property; but it is often very difficult to determine whether it was the purpose of the partners that property should be contributed or simply its use.

Whatever is originally brought into the partnership by any of the members, or whatever is thereafter bought on account of the firm, becomes partnership property. Thus, if A contributed $5,000 in cash and B a stock in trade worth $5,000, the concern has property to the extent of $10,000. A part of B's $5,000 and a part of the proceeds from the sale of the stock in trade are used to acquire other stock in trade. This is also of course partnership property.

In the case put there would be no difficulty in determining that the cash and that the stock in trade became firm property. But in many cases it is quite difficult. It goes back to the intention of the parties; but it may be hard to arrive at what this intention was. Thus, A may contribute the *use* of desks, furniture and other paraphernalia. He may have a very valuable safe which he is willing for the partnership to use, but he is quite without any intention to give the safe itself. Of course, his secret intention would not control, but it would depend on the contract of all the partners. Whether he had devoted a sum equal to the shares of the other members, or if the valuation of property had taken place exclusive of the safe, and similar inquiries might have to be made before it could be determined whether the property or merely its use was given.

Sec. 26. REAL ESTATE AS FIRM PROPERTY.[7] Real estate bought with the partnership funds for partnership purposes, or contributed by a member as his share, becomes partnership property. If it is actually partnership property, it is immaterial in whose name it stands. As far as necessary for partnership purposes a Court of Equity will treat real estate as though it were personal property.

Whether the property or only the use of it belongs to the firm arises perhaps most often in respect to real estate. The fact that the partnership as such cannot hold the legal title to real estate, and that such title must be in the name of some member or in all the members and not in the name of the partnership, and the fact that the agreement in respect to such land is not clear, often produce confusion. If land is owned or acquired in the names of all the partners they may be merely tenants in common, devoting the use of the land to the firm purposes.

If A, owning land, agrees with B to form a partnership which shall use that land, whether the land belongs to the partnership is a question of construction. The fact that there is no deed given to B does not govern.

If land is bought with partnership funds it becomes partnership property, though a deed may have been taken in the name of one partner only, saying nothing of the partnership's interest. In that case a trust results in favor of the firm.

Thus we see that land may be in the name of one partner and yet really be partnership land. On the

7. See the case of Robinson Bank v. Miller, 27 L. R. A. 449 (Illinois) and note.

other hand, it may be in the name of all the partners as tenants in common and yet not be partnership property.

If land really belongs to the partnership it will be treated by a court of equity as though it were personal property for the purpose of winding up the partnership, so far as it may be necessary so to treat it. Thus, suppose that the partnership of A, B, and C has bought land with partnership funds for partnership purposes and taken title in A's name. It is nevertheless firm property and does not belong to A; neither does it belong as a whole to A, B and C as tenants in common, but it belongs to the firm of A, B and C. Should A die the legal title would indeed go to A's heirs, but subject to a trust in favor of the partnership, and A's heirs would ultimately have only so much of the land, if any, as would have been unnecessary to take from A in an accounting between the members and the winding up of the firm.

If title to land is in the name of one partner, with no trusts in favor of the others, or the firm, and there is no record of any sort or any fact to put an innocent purchaser for value on notice, such purchaser will take a good title, free of all the firm equities. But if from the firm's actual possession and use of the land or any other fact, the purchaser knew or should have known that the land was firm property, he will take his title charged with firm equities.

Sec. 27. NATURE OF PARTNER'S INTEREST IN THE FIRM PROPERTY. Each partner's interest in the firm property is of the nature of that of a joint tenant. He does not own any particular part, but he has with the other partners a joint interest in all the

assets of the firm. His interest in the firm is his share of the surplus after all debts are paid and an accounting had between the partners.

If A contributes a lot of land, B $5,000 in money and C a stock of goods, the property ceases to be individual property. A acquires as much interest in the money as B has and as much interest in the stock as C has. It becomes their *common* property. The firm incurs an indebtedness of say $5,000. A's interest is then one-third of the value of the assets less the liability mentioned.

PART III.

MUTUAL RIGHTS AND OBLIGATIONS.

CHAPTER 5.

RIGHT OF PARTNER IN MANAGEMENT OF FIRM.

Sec. 28. PARTNER'S RIGHT TO BE ACTIVE PARTICIPATOR. Each partner has impliedly the right, in the absence of contrary agreement, to represent the firm and take an active part in its management.

We have heretofore noticed that each partner is an agent of the partnership to carry on its business. As he is a part owner he is not subservient to the other partners and they cannot deprive him of his right to represent the firm or to take an active part in its management. This remains true though his interest may be a small interest. He is nevertheless one of the joint owners of the business. As a partner he has a right to sit in the councils, to be consulted on matters of moment, and to be active participator in the concern's affairs.

Sc. 29. RIGHT OF MAJORITY TO GOVERN. A majority of partners can override the will of a dissentient minority only in cases affecting the ordinary conduct of the partnership. If the action contemplates

a material departure from the ordinary matters of the partnership it cannot be carried out against the will of any dissenting member.

A majority of the partners cannot bind the minority except in matters pertaining to the ordinary conduct of the firm's business. By no means can a majority of the members, against a dissentient minority, widen the scope of the business conducted, change its character, enter into unusual expenditures, or in any way materially modify the existing order of the partnership affairs.

Even where it may be conceded that the majority may govern, they must act in the utmost good faith. They must consult the minority and protect the rights of that minority.

CHAPTER 6.

MUTUAL RIGHTS AND LIABILITIES.

Sec. 30. GENERAL RULE OF CONDUCT OF PARTNER. It is the duty of each partner to display absolute good faith toward the other partners and take no secret advantage or profit from the partnership nor restrict its profits by competition.

The position of each partner is one of trust to his associates. Each partner has impliedly undertaken that he will devote his attention to the success of the partnership unhampered by secret influences that tempt him to put anything in the way of its success. He must, then, deal openly with his partners. He must not compete with the partnership, but must ever and in all things display the utmost good faith, as one in whom the trust and confidence of another has been reposed.

Sec. 31. PARTNER CANNOT COMPETE WITH FIRM. A partner has no right to enter into competition with the firm without the firm's consent. Whatever is made by such competition is considered partnership gain.

A partner need not devote all his time and energy to the business, unless that is his contract. It may have been understood between the partners that but a small part of the time of one of them should be given, and that he should have a right to carry on his other

interests. But it is always to be understood that the partner will not enter into competition without the consent of his partners. Such a rule is highly reasonable and just. If A and B open a grocery store in a certain town, B cannot open a competing store, even though it may have been agreed that B need not spend any of his time at the store, his part being to furnish capital.

If the partner violates his duty in this respect he will be enjoined by a court of equity from proceeding further, and must account to the partnership for the profits obtained in violation of his duty, for the court will not hear him say that such profits were not made for the partnership.[8]

Whether he would have a right to engage in other businesses which do not compete would depend strictly upon his contract in each particular instance. If he has promised to give his entire time, the court will enjoin him perhaps from a breach but will not in that case give a right to an accounting for profits though it may award such damages as have been sustained.[9]

If in competing with his firm, a partner suffers loss, he must bear such losses alone, but profits made by him belong to the firm.

Sec. 32. PARTNER CANNOT OPPOSE INDIVIDUAL TO FIRM INTERESTS. A partner will not be allowed to secretly oppose his interests to those of the firm. Thus, he cannot sell to the firm or buy from it secretly to his own profit.

8. Metcalfe v. Bradshaw, 145 Illinois Reports, 124.

9. Id. Wherein the Court decided, that a member of a law partnership could not be compelled to account for fees obtained by him for serving as administrator.

The general rule which requires the partner to observe utmost good faith prevents him from secretly opposing his interests to those of the firm. Thus if the partnership contemplates purchasing something for use in carrying on the affairs of the firm and A, one of the partners, is appointed to make the purchase, he cannot secretly buy the thing for the firm from himself and thus make a profit for himself. He should make full disclosure, and secure the consent of the firm, otherwise he will be accountable. The reason is that under the circumstances he is highly tempted to oppose his interests to those of the concern. So he cannot sell to himself secretly. He cannot in any transaction make a secret profit. By his agreement he has undertaken to give the partnership the benefit of his zeal, and all acts which he does as a partner, that is to say, as agent of the firm, he does for the firm's interest.

Sec. 33. THE RIGHT OF THE PARTNERS TO DEAL OPENLY WITH THE FIRM. A partner may deal with a firm as a stranger when the partners consent to his acts. He may, by loaning money, selling goods, etc., become a creditor of the firm, and may take a security.

A partner may openly deal with his firm, and very often does so. He may loan it money and secure himself with a mortgage. He may stipulate for interest on such loan at a legal per cent. He may sell his own supplies to the firm at a profit, provided the firm realizes that he is selling at a profit and consents to the transaction.

Sec. 34. RIGHT OF PARTNER TO SUE FIRM. A partner cannot bring an ordinary suit at law against

the partnership as he would then be both plaintiff and defendant, but he must file his bill in a court of equity to have an accounting. He may at law sue his partners where they are individually liable to him on accountings previously had between them, etc.

Usually a partner must seek his remedy against his co-partners as such in a court of equity. A court of equity will decree accountings and a dissolution upon proper ground being shown. But a partner cannot sue the firm in an ordinary action at law. The reason is that he would be both plaintiff and a defendant.

Sec. 35. RIGHT OF PARTNER TO COMPENSATION, INTEREST, ETC. A partner has no right to any salary or compensation for time and labor, or any interest on capital invested, unless there is an express agreement to that effect.

A partner is presumed to have entered into the partnership agreement in expectation of profits to be derived from the business, and to that end he devotes his time and labor. He can claim no compensation for his time though he may indeed have given more time than required.

Often a partner is allowed a salary by special agreement in view of the fact that he is to spend more time in the business of the firm than the other partners. In that case his share of the profits is in addition to his salary. For the same general reasons a partner has no right to interest on the capital he has invested. Where he loans money to the firm that is, of course, usually upon interest.

A partner cannot prove his claim against the firm in the event of its bankruptcy until other creditors are satisfied, for that would allow him to prove up against his own creditors.

PART IV.

THE PARTNERSHIP AND THIRD PERSONS.

CHAPTER 7.

APPARENT AUTHORITY OF PARTNER TO REPRESENT THE FIRM.

Sec. 36. GENERAL STATEMENT. Each partner has the apparent authority to act for the firm upon all contracts made in the regular conduct of the business of the firm.

We have seen that the partners are co-owners of the business, and that each one, as such co-owner, has a right to active participation in the conduct of the firm. Each partner, therefore, has a very large actual authority to represent the firm and do all those things necessary to carry on its business unless in any particular case he has contracted with his co-partners that he will be inactive and have no or but little part in the management.

It is a fundamental principle in the law of agency, as we have seen, that an agent may bind his principal upon all contracts which he has the apparent power to make, irrespective of his real authority. His *apparent* power is all that concerns third persons. A *special agent*, that is to say, an agent engaged to represent one in particular transactions, has very little

apparent authority aside from his real authority. If A sends B to collect a note which A holds against C, B, a special agent, has only the power to collect the note. He has no apparent power to extend it instead of collecting it and has no power to collect other notes. C can only rely upon the actual authority which A has bestowed and if B extends the note, A is not bound by it, but may immediately bring suit. But a general agent has fuller powers. If I find a man in control of a grocery store as the manager thereof, I can assume that he has *all* the powers which he seems to have, that is, all the powers which persons in that situation usually have. He may in fact have a very restricted authority, but that does not concern me so long as I have no notice of it, and I can hold the owner on all contracts made by this general agent which he has *seeming* power to make, notwithstanding he may exceed his real authority and thus break his contract with his principal.

Partners are apparently general agents of each other. Each partner has a very full authority to represent the owners. A third person is entitled to believe that as the partner has a common ownership in the business and usually a right to a voice and a hand in its management and conduct, the particular partner with whom such third person is now dealing has this usual right. Secret stipulations between the partners are immaterial to the third person. He can rely on the large apparent authority which the partner has. Now a partner has this large apparent authority because in the majority of cases he has the real authority.

If A and B and C form a partnership, it is the common custom that each *shall* have a *real* authority

to do those things which partners in like concerns in that locality have the power to do. Each places a trust in the other that he will not abuse his authority to make private gain. The relationship rests in mutual confidence. Therefore a third person dealing with any partner has a right to take this consideration into account. He may presume that this particular partner has not had his authority curtailed by special agreements.

What apparent authority a partner has, we have said grows out of the real authority which partners in a like situation usually have. Therefore, in any particular case we have to consider the nature of the business and what authority partners in that kind of business usually have. But then we have also further to consider, after all, the *particular* business, as it has actually been conducted. For instance, we might find that in a special sort of partnerships a partner does not have apparent authority to bind the firm on negotiable paper, yet in a particular firm we might find that the authority had evidently been conferred, as the partner whose act is now questioned had been accustomed to issue such paper and the firm had been accustomed to honor and pay it without objection. So we always have to bear in mind these considerations and to solve the question by reference thereto.

A member of a *trading* partnership has, usually, larger apparent powers than a member of a non-trading partnership. A non-trading partnership does not buy and sell except incidentally, and consequently a partner does not need to have the power to do those things which go with buying and selling.

We will consider in the following sections whether a partner has apparent powers to do certain things,

bearing in mind that we approach the subject from the standpoint of the powers usually existing in such a case. In any particular partnership there might be either a curtailment of such powers or an extension thereof by the course of dealing in that particular partnership.

We must also bear in mind that a partner representing a firm, not only binds the other partners, but he likewise binds himself.

Sec. 37. APPARENT POWER OF PARTNER TO APPOINT AGENTS AND EMPLOY SERVANTS. Each partner of a trading partnership has the apparent power to employ agents and servants reasonably necessary to conduct the business of the firm.

A partner of a trading partnership has apparent authority to employ agents and servants. Of course the particular scope and extent of the partnership would be a large consideration. Thus if there were a very large partnership, the employment of bookkeepers and sales agents would not be unreasonable, whereas it might be so in a small concern.

Sec. 38. APPARENT POWER OF PARTNER TO BUY AND SELL STOCK IN TRADE. Each partner in a trading concern has the apparent authority to bind the firm in the purchase or sale of goods of the class in which it regularly deals.

A partner in a trading concern has apparent authority to replenish its stock in trade, sell goods from the stock in trade, and make contracts in reference to the same. This authority exists for very obvious reasons. The main business of the concern is to buy and sell, and to withhold from any partner the right

would be to deprive him of his right to co-operate in the conduct of the firm's business. Yet in any particular case the apparent authority might not exist at least as to particular persons. Thus, A, a wholesaler, might have been informed, by word or conduct that X, of the firm of X, Y and Z, was the purchasing agent and had the exclusive authority in that respect. Yet B, another wholesaler, who had had no previous dealings, might not have notice of any such a restriction.

In such a case it would be immaterial if the partner took the goods so bought and used them for his own private purposes and profit, so long as the seller did not know that was his purpose. Thus in one case, two were partners in the harness business, and one of them bought a great number of bridles which he immediately pawned for money for his own use. It was held that the other partner was liable.[10]

Members of non-trading partnerships, are usually held not to have apparent authority to buy and sell.

A partner would have no apparent power to dispose of the entire business of the firm or its entire stock in trade when the natural result would be to put the firm out of business or seriously embarass it.

Sec. 39. POWER OF PARTNER TO BUY AND SELL REAL ESTATE. There is no apparent power to sell the firm's real estate or buy real estate for the firm.

A partner has no apparent power to bind the firm in the sale or purchase of real estate. He may of course bind himself. If firm real estate stands in his own name he may sell it and give a clear title thereto

10. Bond v. Gilson, 1 Campb. 185.

to any one who did not know, and is not bound from the circumstances to know, that the real estate was really firm property.

Sec. 40. POWER OF PARTNER TO MAKE WARRANTIES. Where a partner has actual or apparent authority to sell goods he has the apparent authority to make usual warranties.

Having the power to sell, a partner may make ordinary warranties, as that a horse is sound, and all the partners will be bound upon the warranties.

Sec. 41. POWER TO BIND FIRM ON NEGOTIABLE PAPER. A member of a trading firm, whose usual business requires the use of negotiable paper may bind the firm upon such paper.

If negotiable paper is issued, accepted, or endorsed, by a partner in a firm, the conduct of whose usual business requires the use of negotiable paper, the firm will be bound.[11] In such case the fact that the partner may make a personal use of the paper is immaterial so long as the other parties have no notice. Thus a partner having the power to sell stock in trade, might take a note in payment thereof and sell the note to a banker, pocketing the proceeds. The firm would be bound as endorser.

No one is bound upon firm paper except his name, real or fictitious, appears thereon. Thus, if a partner signed only his own name the other partners would not be bound. But if he signed the names

11. Dowling v. Exchange Bank of Boston, 145 United States Reports, 512.

of the partners, or the partnership name, all the partners would be bound, provided he had apparent authority to sign.

If a partner has apparent authority to bind the firm upon negotiable paper, the partnership will be bound upon any paper which comes into the hands of an innocent purchaser, for value, although there was no apparent authority to issue this particular paper in question so far as the original parties were concerned. Thus the party to whom the paper was payable might have known that A was binding the firm for his own personal profit. Consequently such party would have no rights. But a party to whom the paper was sold might have a good title.

A member of a non-trading firm is usually held not to have any apparent power to bind the firm upon negotiable paper, unless it had been the custom of such firm to permit one of its members to issue, endorse or accept paper, and the person now seeking to hold the firm knew of such custom and relied upon it.[12]

Sec. 42. POWER OF PARTNER TO BORROW MONEY ON FIRM CREDIT. A partner in a trading firm has the apparent power to borrow money to carry on the partnership in the ordinary way.

If a partner borrows money for the firm on the firm's credit, and the firm makes use of such money, it is of course bound. But suppose the partnership never obtains the benefit of such loan. Suppose that the partner appropriates the money so secured for his own private purposes; is the firm, which gave

12. Id. And see Vol. II. The Law of Negotiable Paper, in this series.

no actual authority to the partner, liable because of his apparent authority to make the loan? It is, provided the borrowing was apparently done for the purpose of carrying on the partnership in the regular way and within the general scope of the ordinary partnership business.

Of course if the party loaning the money knows of the partner's intention to make use of it for his own benefit, he cannot hold the firm, for he knows that the partner has no power to use the credit of the firm for his private gain.

Sec. 43. POWER OF PARTNER TO SETTLE, COMPROMISE, RELEASE, ETC. A partner who has apparent power to buy and sell and receive and give payment, has apparent power to settle, compromise and release claims.

If a claim is made by or against a trading firm, a member thereof who has the apparent power to collect or disburse moneys would have the power to treat with the debtor or creditor concerning such claim and compromise and settle it. Thereupon the entire firm would be bound by such compromise and settlement.

Sec. 44. POWER OF PARTNER TO SETTLE INDIVIDUAL DEBTS WITH FIRM ASSETS. A partner has no apparent power to use the firm assets for the payment of his individual indebtedness.

As the firm is not liable for the debts of one of its members, a creditor of one of the partners is bound to know that such partner has no right to take assets of the firm with which to pay his individual debts and in such a case the firm could recover

such assets or their value, unless the creditor could show that the firm had known of and assented to such use of its assets.

Sec. 45. PARTNER MAY BE SPECIALLY AUTHORIZED TO REPRESENT THE FIRM IN ANY LEGAL TRANSACTION. A partner may be given actual authority to represent the firm to bind it in any legal transaction.

We have above considered the cases in which a partner has *apparent* authority without respect to what his real authority may be. It is of course competent for the firm to specially authorize the partner to enter into any contract in its name, no matter how far from the usual conduct of the firm. Thus he might be empowered to buy real estate, to contract for the erection of a building, to buy goods of a class different from that in which the firm usually deals, and so on. In such case he is made a special agent, and the firm would be bound because it has given him actual authority. In such a case there would be no apparent authority aside from the actual authority. One dealing with a partner in such a case would be bound to make inquiry as to what his actual authority was, or else take the risk that the partner was exceeding his actual authority.

Sec. 46. RATIFICATION WHERE NO ACTUAL OR APPARENT AUTHORITY. Granting that the firm could not be held by the act of one of its members, because neither any actual nor apparent authority, still it may become bound through a ratification of the act.

Very often a firm is clearly not bound by the act of one of its members, because he has neither the real

nor the apparent authority to bind it, but it becomes bound because it *ratifies* the act and thereby cures the lack of authority.[13] Ratification may consist in words or conduct. Thus where a firm receives the benefit of an act, it cannot say that there was no authority. By receiving the benefits of an act done in its name it will become estopped to set up the lack of authority.

In order that there may be ratification the act must have been done in the name of the firm and upon its credit. What has been said in respect to ratification on pages 36-44 applies here.

13. **Porter v. Curry, 50 Illinois Reports, 319.**

CHAPTER 8.

LIABILITY OF PARTNER FOR TORTS OF CO-PARTNER.

Sec. 47. GENERAL RULE. If a tort is committed by one partner with the consent of the others, or if not with their consent, then within the scope of the wrongdoing partner's authority, the co-partners are liable with the wrongdoing partner.

We discover in the law of agency that a principal may be responsible for injuries caused by the tort of his agent, although the tort was totally unauthorized by him. In such a case the tort must have been within the scope of the agent's authority, and not a wilful or independent tort. Applying this principle to the law of partnership, a partner may be made liable for the torts of his co-partners committed as a part of the act of representation. If, however, the tort is a wilful and independent tort, the other partners will not be liable. We may consider some particular situations and thus better understand the law.

Sec. 48. LIABILITY OF PARTNER FOR FRAUD AND DECEIT OF CO-PARTNER. Where one partner commits a fraud or is guilty of deceit while representing the firm within the scope of his authority his partners are liable for the fraud.

The most common cases in which one partner is held for the tort of another are the cases of fraud and deceit. It may clearly be seen how such torts

fall within the scope of the authority of the partner. They are the torts which would usually be committed in the buying and selling of goods, and carrying on the business of the firm.

Thus in one case the court held that where a partner sold sheep pelts belonging to the partnership, fraudulently replacing the pelts actually contracted for with inferior pelts, the other partner was liable though he had no participation in the fraud.[14]

Sec. 49. LIABILITY OF PARTNER FOR NEGLIGENCE OF CO-PARTNER. Partners are liable for the negligence of their co-partner whereby harm ensues when the negligence is within the scope of the authority.

Whether the negligence of one partner will bind the others depends upon the usual rules of agency, which we discussed in other pages. Thus a partner negligently driving a delivery wagon to the injury of a pedestrian, would make the other partners liable in damages. But if he were using the delivery wagon for picnicking purposes, they would not be liable, although of course, he would be. So, also, in a partnership of attorneys, the negligence of one in taking care of business entrusted to the firm would make the other partner liable with him.

Sec. 50. LIABILITY OF PARTNER FOR INDEPENDENT TORTS OF CO-PARTNER. For independent torts of a co-partner, though committed for benefit of the firm, co-partners are not liable, when there was no actual assent and has been no ratification.

14. Wolf v. Mills, 56 Illinois Reports, 360.

Where a partner commits a tort which cannot be said to be a part of the act done within the apparent scope of his authority, but is of a wilful and independent nature, the co-partners will not be liable. Any one can readily see that the partners would not be liable for the torts of a partner which are entirely apart from the firm business; and even if they are connected with the firm business, still if they are of an independent sort, the partners who have not assented to the torts or ratified them, will not be liable. Some courts say that if the tort of the partner is a *wilful* one, the other partners will not be liable. But this is not strictly true. Fraud and deceit are wilful torts. So we find it better, perhaps, to say that if the tort is of an independent nature as though the wrongdoing partner had, so to speak, stepped out of his representation of the firm, to act, perhaps for its benefit, still upon his own responsibility, the other partners will not be liable. Thus in one case, a partner induced a creditor of the firm to enter the state and then had him wrongfully arrested. The other partner knew nothing of the act and upon learning of it immediately repudiated connection with it. It was held he was not liable for damages caused by the wrongful arrest.[15] On the other hand, one partner had been held for the defamation of another where the defamation was uttered as a part of a firm transaction; but in most cases, we may assume that one partner would not be held for the defamation uttered or written by his co-partner. So for assault and battery and such torts, the other partner would not be liable unless he sanctioned or ratified the act, or took the benefit of the transaction of which it was a part.

15. Rosenkrans v. Barker, 115 Illinois Reports, 331.

CHAPTER 9.

RIGHTS OF THIRD PERSONS AGAINST INCOMING, OUTGOING AND SECRET PARTNERS.

Sec. 51. LIABILITY OF INCOMING PARTNER. A partner entering an established business is not liable to creditors for pre-existing debts unless he affirmatively assumes such past indebtedness.

If A enters upon a partnership with B, that does not in itself make him responsible for B's indebtedness. No business man would consider that by combining his business interests with another, he should be made liable for that other's already existing debts, except on special agreement. The rule is the same if he enters as a member of an existing partnership. Parties who sue after that time for a pre-existing liability cannot make the new partner responsible.

A partner may, however, take upon himself the burden of the past indebtedness. In such a case creditors can sue him as though he had been a party when their claims arose. Such assumption of the debts may be shown by the conduct of the incoming partner, as well as by his express undertaking.

Sec. 52. LIABILITY OF OUTGOING PARTNER. A partner will be liable for debts incurred during his membership in the firm, whether or not he retires before suit is brought. For debts incurred after his retirement he will be liable to those who have no notice of his withdrawal and contract on the faith of his continued liability.

One cannot by withdrawal from a firm, thereby withdraw from liability for debts incurred while he was a member. Of course as between the partners themselves this may be brought about, but we are now considering the rights of third persons. Thus if I deal with the firm of A, B and C, and C afterwards withdraws before my claim is paid, he cannot thereby deprive me of my rights against him. For purposes of my suit, the firm of A, B and C still exists. It may be that when C withdrew, he did so under an agreement with A and B that they would assume all the indebtedness. Yet A and B might be financially irresponsible, and C the only sound creditor. Whatever A, B and C may agree among themselves cannot affect existing rights of a creditor unless he becomes a party to the agreement; and that might be the case.

Upon withdrawal, the withdrawing partner should be careful to see that due notice is brought to all who may continue to deal with the concern under the impression that he is still a partner. Good faith requires he should take steps to bring notice home to such parties. The rule is that those who deal with the firm after the withdrawal of a member thereof and who have no notice of his withdrawal, may hold him.

In an Illinois case a peculiar application of this rule arose. The members of a partnership concluded to incorporate. They formed a corporation which took over the business, but which continued in the same name. This amounted of course to a withdrawal of all the partners from the partnership. A creditor who had dealt with the partners as such, continued to deal with the firm after incorporation. He sued the members of the partnership upon a claim

arising after incorporation. It was held he could have a personal judgment because he dealt with the firm without notice of the cessation of the partnership relation.[16]

What will constitute notice which will relieve a withdrawing partner of continued liability? Will advertisement be sufficient? The rule is that those who have dealt with the partnership while the withdrawing partner was a member are entitled to actual notice; as far as others are concerned, it is sufficient if he make a public announcement in some local newspaper.

Sec. 53. LIABILITY OF SECRET PARTNERS TO THIRD PERSONS. A secret partner is responsible to third persons upon those claims arising during his membership in the firm and such other claims as he may assume. No notice of withdrawal is necessary.

A secret partner is a real party in interest and contracts made with a firm of which he is a member are really made with him. He enjoys the benefits of such contracts and therefore ought to bear their burdens. Just as in the general law of agency we find that an undisclosed principal is responsible upon disclosure for the acts of his agent, so in this branch of the law of agency we hold an undisclosed partner liable.

Upon withdrawal, a secret partner need not give notice in order to save himself from further liability, because it cannot be said that subsequent indebtedness was incurred upon the credit of his continued membership.

16. Weise v. Gray's Harbor Commercial Co., 111 Illinois Appellate Court Reports, 647.

CHAPTER 10.

THE NATURE OF THE PARTNER'S LIABILITY TO THIRD PERSONS.

Sec. 54. PARTNERS JOINTLY LIABLE. Partners are jointly liable upon contract debts. But for torts are both jointly and severally liable.

Assuming that all the partners are liable to some third person, what is the nature of that liability. In an indebtedness arising out of contract in which all acted in person or by apparent agent, their liability is *joint;* that is, they must all be sued jointly, and cannot be sued separately. Thus if A, B and C, partners, contract with M and thereby he obtains a claim against them, upon suit, he must join them all. If he cannot obtain service upon all, he may proceed to judgment against those upon whom service is had.

In tort, the rule is that each one responsible or participating, is severally liable. If A, B and C commit a tort, D, the injured party, may sue A, or B, or C, alone or all of them or any two of them together.

Sec. 55. LIABILITY OF EACH PARTNER ALSO IN TOTO. Though the liability of the partners is a joint liability, any partner may eventually be made responsible for the firm's entire indebtedness.

We have noted that all the partners must be sued upon a firm indebtedness. Yet, after all, one of the

partners may be ultimately made to pay the firm indebtedness. Thus suppose M sells goods to the firm of A, B & C. He may have sold to that firm solely upon C's credit. In suing the firm he must sue them as A, B & C, partners, trading as (for instance), A & Co. Yet if A and B become or are insolvent and C remains solvent, C may be made ultimately to pay the debt. If M obtains judgment against A, B & C, he may execute it by levying upon the property of any one of them, leaving them to account among themselves.

But see the next chapter for full discussion of rights of a creditor against the property of a firm or the members thereof.

CHAPTER 11.

REMEDIES OF CREDITORS.

A. Where No Judicial Proceedings Are In Progress to Distribute Assets.

Sec. 56. RIGHT OF FIRM CREDITOR AGAINST FIRM PROPERTY. A firm creditor has no rights upon the property of the firm except where he may have obtained same by judicial writ or by special contract. Then his rights against the firm property are governed by the same rules that govern the rights of secured and lien creditors against any debtor.

If A is indebted to M, that in itself gives M no rights against the general property of A. One must first obtain a mortgage, or the lien of a judgment or of an attachment proceeding, or a lien as bailee, or otherwise, before he can have rights against the property. Thus if M, a wholesale druggist, sells goods to A, a retail druggist, and takes back no mortgage. and retains no lien of any sort, he has no right against A's goods. A may sell them and mortgage them, What is true of an individual debt is true in respect to a partnership debt.

If one has a mortgage or other contract lien or secures a judgment, his rights to enforce the same are governed by the same rules which apply when one's debtor is an individual or corporation so far as the nature of such rights is concerned. He may

foreclose whatever mortgage he has, or he may execute his judgment by levy on the propery of the partnership.

Sec. 57. RIGHT OF FIRM CREDITOR AGAINST INDIVIDUAL PROPERTY OF PARTNER. A firm creditor who has a judgment against the members of the firm may execute it by levy on the partner's individual property.

It will be remembered that one sues a partnership by suing the individual members who compose it, all of whom he must join as defendants. If he obtains his judgment, it runs against the partners individually, trading as partners. This judgment one may execute by levying upon partnership property or upon the property of the individual partner. In such a case it is not necessary that the partnership have no assets. One may ignore the partnership assets and levy on individual property.

In cases where the law allows attachment of property before judgment, a firm creditor may attach the individual property of a partner.

Sec. 58. SECURING OF PREFERENCES BY CREDITORS. By the common law and where there are no proceedings under statute to distribute assets one creditor may be preferred over others, or may secure prefrence through legal proceedings.

If a partnership composed of A, B & C have, say, three general creditors, M, N, and O, the partnership upon becoming insolvent may prefer M, over N and O, by paying M his claim in full, having nothing left wherewith to pay N and O. This presumes, of

course, that no proceedings are being had under insolvency or bankruptcy laws which provide against such preferences. So M may secure a judgment against A, B and C, and through this judgment secure a preference over N and O. In bankruptcy, by proceedings begun in apt time, such preference may be set aside.

Sec. 59. RIGHT OF CREDITOR OF INDIVIDUAL PARTNER AGAINST FIRM ASSETS. A creditor of a member of the firm may upon securing judgment levy upon the partner's interest in the firm.

If A, of the partnership of A, B and C owes M, and M secures judgment on his claim, he is not confined to A's individual assets, but may have levy made on A's interest in the firm. He may not levy upon the property of the firm or any part thereof, for none of it is A's property. It is the property of A, B and C, together in joint ownership, but he may have the levy upon A's interest in the firm, which may be great or small, and consists in the share that would have come to A after the payment of debts and an accounting had between the partners.

B. Where Judicial Proceedings Are In Progress to Distribute Assets Among Creditors.

Sec. 60. PROCEEDINGS IN BANKRUPTCY. Creditors may, upon the commission of an act of bankruptcy by a partnership, have bankruptcy proceedings begun for the distribution of the assets among creditors. In such a case creditors share in the assets according to equitable principles.

If a partnership becomes insolvent, and commits an act of bankruptcy, it may then be made a bank-

rupt, and its assets may be taken for distribution among its creditors. The most common act of bankruptcy is the giving of a preference to a creditor or a securing of a preference by him through legal proceedings. All such preferences which occur within four months prior to the filing of a petition in bankruptcy may be set aside, provided the creditor knew or had reasonable cause to know that a preference was intended by the payment to him.

Secured creditors and creditors with a lien which the proceedings in bankruptcy do not dissolve are not deprived of their rights by bankruptcy proceedings, and may rely upon their security or liens.

It is customary to have the members of a partnership adjudged bankrupt as partners and individually. This brings both the firm assets and the individual assets before the Court.

Our bankruptcy law provides as follows: "The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership." [17]

17. Bankruptcy Act. Sec. 5f.

Where there are no partnership assets, but there are individual assets, it is usually held that the partnership creditors can share with the individual creditors in such assets.

Sec. 61. PROCEEDINGS UNDER STATE INSOLVENCY LAWS. Under state insolvency laws, usually in suspense during the existence of a national bankruptcy law, the assets of an insolvent concern and of the members thereof are distributed among creditors.

As there is now a Federal Bankruptcy Act in force, under which distribution of assets is likely to take place, we need not notice here what rules prevail under state insolvency laws. The Courts of Equity apply rules to different sets of facts, and different rules have prevailed in different courts.

PART V.

DISSOLUTION OF PARTNERSHIP.

CHAPTER 12.

DISSOLUTION BY LAPSE OF TIME, AGREEMENT, AND TRANSFER OF PARTNER'S INTEREST.

Sec. 62. IN GENERAL. Dissolution of a partnership may be brought about by lapse of time; by mutual agreement; by transfer of a partner's interest; by death of partner; by bankruptcy; by judicial decree for various causes.

Dissolution of a partnership may be brought about by the act of one of the partners without the consent of the others (in which case the one committing that act might become liable for breach of the partnership contract); by the act of all of them, as by agreement; and by causes beyond control of any of them. It may also be brought about in the Courts at the instance of one without the consent of the others. In this and the following chapters we will discuss the causes of dissolution and the consequences that follow dissolution.

To get before us the various causes of dissolution let us tabulate them as follows:

Dissolution may be caused:

(1) By lapse of the time agreed upon.

(2) By mutual agreement.

(3) By transfer of partner's interest either by his own act or by operation of law.
(4) By death of a partner.
(5) By bankruptcy proceedings
(6) By judicial decree.
    (a) Because of internal dissensions;
    (b) Because of partner's incapacity;
    (c) Because of partner's misconduct;
    (d) Because of the financial failure of the enterprise.

In considering the *power* of one partner to dissolve the partnership, without the consent of the other members of the firm, we must remember that one may have the power to do a thing when he has no *right* to do it. A partner may always by his act dissolve the partnership, just as any contracting party may break his contract. If the dissolution so caused is wrongfully caused, he will of course be liable in damages.

We will in this chapter consider dissolution by lapse of time, agreement and transfer of partner's interest, and in subsequent chapters, dissolution from other causes.

Sec. 63. DISSOLUTION BY LAPSE OF TIME. When the term has passed or the object attained for which the partnership was founded the partnership comes to an end unless the parties agree to continue it.

Partnerships are frequently formed for a certain period although, in numerous cases, the partnership runs indefinitely or perhaps periodically, that is by periods at the end of any one of which the partner has the right to withdraw by giving the notice provided for in the agreement. Partnerships that are

stated to be for a certain period may continue afterwards by mutual agrement, and the partners may simply continue in business together without any new definite contract.

Sec. 64. DISSOLUTION BY MUTUAL AGREEMENT. Partners may mutually agree to abandon the enterprise and dissolve the partnership at any time.

Of course the partners may mutually agree to dissolve the firm and thereupon wind it up. Whenever they can do this then no appeal to the Courts is necessary. We shall hereafter consider dissolution by judicial decree. That signifies, of course, that the partners could not mutually agree to dissolve, or, at least could not mutually agree as to their rights upon a dissolution, for if they could, no appeal to the Courts would be necessary.

Sec. 65. DISSOLUTION BY TRANSFER OF PARTNER'S INTEREST. A transfer of a partner's interest by the partner or through the operation of the law works a dissolution.

We have heretofore considered that one cannot be made a partner with another without his consent. It follows that if one partner sells his interest to another or has it taken from him by the law as where it is taken under execution, this in itself works a dissolution. So even if the other consents there is really a dissolution of the partnership, and if the business is carried on as before it is really carried on by a *new* partnership.

The partners may by agreement give transferability to shares. In such a case the partnership can-

not be said to be dissolved in the sense that there is any right to a winding up or an accounting.

If a creditor secures, through legal proceedings, a partner's interest, he secures no right to continue in the business with the other partners. He steps in the place of the other partner only to the extent of having a right to demand his share.

Sec. 66. LIQUIDATION UPON DISSOLUTION FOR FOREGOING CAUSES. In the event of dissolution by reason of the foregoing causes it is the duty of the partners to liquidate, that is to settle with creditors and account among themselves. Each partner has the power to assist in the winding up of the firm, unless one partner has been given the sole power of liquidation.

When the partnership dissolves it is the duty of the partners to pay the firm debts and to account among themselves. Each partner has apparent authority to take part in the winding up and to that end may collect, release and compromise.

If the debts are more than the assets will pay, then the partners must share in the losses in the proportions in which they have agreed to share the profits or losses.[17a] This is a matter which concerns them alone. A creditor may hold any partner for the entire debt, as we have seen, irrespective of what his interest may be, whether large or small.

Sec. 67. THE ACCOUNTING BETWEEN THE PARTNERS, AND DISTRIBUTION OF ASSETS. Firm debts being paid, the partners must account among

17a. Whitcomb v. Converse, 119 Massachusetts Reports, 38.

themselves and distribute the assets. A partner is entitled to a repayment of the capital paid in by him so far as the assets after debts are paid permit such repayment.

After all the debts of the partnership are paid, it then becomes the duty of the partners to account among themselves to see what share of the remaining assets each partner is entitled to. Any money loaned to the firm by a partner is to be first paid. After that each partner is to be repaid the amount of capital he contributed, or such proportion thereof as the assets will permit. But no partner is to be individually liable for the repayment of capital.

We may suppose that the firm of A, B and C is about to dissolve by mutual agreement. A has contributed $5,000 as his share, B has contributed $2,500 and C gave his time and skill. The partnership has endured for a year. Its debts are $2,500. Its assets at the time of dissolution are $10,000. The debts of $2,500 must be first paid, thus leaving $7,500 for division among the partners. $5,000 of this should go to A, and $2,500 should go to B. C is entitled to no part of the capital as he contributed only his skill and time, and it is to be considered that he takes his skill out of the firm as the others take their money, and he gave his time in hope of profits, just as the other partners gave their money without interest in hope of profits in lieu thereof.

Had there been losses C would be obliged to bear his proportionate part.[17b]

17b. Whitcomb v. Converse, supra.

CHAPTER 13.

DEATH OF PARTNER.

Sec. 68. EFFECT OF DEATH OF PARTNER. The death of one of the partners dissolves the firm in the absence of any agreement to the contrary and it becomes the immediate duty of the surviving partners to wind up the firm.

As we have previously noted, death of a partner works a dissolution of the firm. To be sure the business may continue much as before, so far as the public is concerned, but it is really a new partnership which has taken over the affairs of the old and settled with the executor or administrator of the deceased partner.

There may be a stipulation that death shall not dissolve the partnership but that it shall continue notwithstanding the death of any member. This is virtually what is done in case of a joint stock company. So the Articles of Partnership may make such an agreement.

Sec. 69. RIGHTS, TITLES AND DUTIES AS BETWEEN SURVIVING PARTNER AND REPRESENTATIVE OF DECEASED PARTNER. The surviving partner takes the title to the partnership property. The executor or administrator of the deceased partner has no title therein, but he has a right to have the partnership affairs wound up, and settlement made with the deceased partner's estate.

The surviving partner takes title to all the personal property belonging to the firm and to him belongs all the right and devolves all the duty of settling the firm's affairs. The administrator or the executor of the deceased partner, as the case may be, obtains no title to the property of the firm and has no right to have any part in its settlement. He may however, demand that there be a settlement, that the affairs of the firm be wound up, and the part coming to the estate of the deceased partner after all debts are paid, turned over to him.

If the administrator or executor believes and can show that the surviving partner is wasting the assets and is not winding up the affairs as a prudent man, he might have a receiver appointed to take charge of the business for the purpose of winding it up. In this way he may protect the interest of the deceased partner.

Thus, A, a partner in the firm of A and B, dies, and his administrator is appointed by the Court of Probate. The title to the assets of the partnership devolves upon B, and the administrator has no title to the partnership property and no right to take part in its affairs. But he does have a right to have B wind up the firm and pay over to the estate the amount to which it is found upon accounting that A's estate is entitled to.

Sec. 70. DEVOLUTION OF TITLE TO FIRM REAL ESTATE. The real estate belongs to the firm, no matter in whose name it stands; it will be treated as personal property to the extent necessary for the purposes of settling the firm debts and adjusting equities.

We have previously seen how firm real estate must stand in the name of some individual or individuals, and if it is firm property, it is largely immaterial in whose name it stands: in such a case it will be considered firm property, as though fully declared to be held in trust for the firm. If it is in the name of the deceased partner, the records would not show the partnership interest therein (unless declared in the deed to be on trusts, etc.), and in that case the heirs or devisees of the partner would seem to get title. But for partnership purposes, they would get their title subject to the liabilities of the partnership and the equities of the partners. This subject is often a very complicated and difficult one and sometimes requires extended Court action to settle the matter.

Sec. 71. RIGHTS OF CREDITORS OF FIRM AGAINST SURVIVING PARTNER AND ESTATE OF DECEASED PARTNER. The creditors of the partnership may either sue the surviving partner or present their claims against the deceased partner's estate.

The firm creditors may sue the surviving partner, or they may proceed against the estate of the deceased partner. Thus A of the firm of A and B dies. B becomes liable for the firm debts. C, a creditor can sue B, or he can present his claim against A's estate. It is held, however, in most states that if he presents the claim against the estate, he cannot have realization thereupon until the separate creditors of the deceased partner have been satisfied; unless there is no living solvent partner, in which event he can prove up his claim *pari passu* with such separate creditors.

CHAPTER 14.

DISSOLUTION BY BANKRUPTCY PROCEEDINGS AND BY JUDICIAL DECREE.

Sec. 72. DISSOLUTION BY BANKRUPTCY. The bankruptcy of the firm or a member thereof dissolves the firm.

By bankruptcy we indicate that there has been an adjudication by a court that the firm or some member thereof is bankrupt; and we do not mean mere insolvency. One is insolvent when his assets are of less value than the amount of his liabilities; he is bankrupt when a petition in bankruptcy has been filed by or against him in a bankruptcy court and he has been duly adjudicated a bankrupt. Bankruptcy of the firm or of one or more of the partners dissolves the firm. The Court of bankruptcy would proceed to an equitable distribution of the assets of the firm between the creditors of the firm and the separate creditors of the partners, provided the partners were also in bankruptcy. See the extract from the bankruptcy law stated on page 187.

Sec. 73. DISSOLUTION BY JUDICIAL DECREE ON ACCOUNT OF INTERNAL DISSENSIONS. If the partners are in a serious state of dissension, so that the prosperous conduct of the firm becomes impracticable, the court will on application decree a dissolution and wind up the affairs.

For small or trivial matters of difference, the Court will not decree dissolution, but if the dissensions render success impossible or impracticable, a Court of Equity will take jurisdiction to wind up the affairs and declare the firm dissolved. As stated before, if the partners could agree upon a dissolution for such cause, there would of course be no reason for proceeding in court. We assume, now, that they do not agree upon a dissolution, or else are at difference on the matter of their mutual rights and liabilities.

Sec. 74. DISSOLUTION BY JUDICIAL DECREE ON ACCOUNT OF PARTNER'S INCAPACITY. Where one partner becomes seriously incapacitated, the courts will decree dissolution.

When a partner for any reason, becomes incapacitated from performing his duties, the other partner may have the Court decree that the partnership is dissolved.

Sec. 75. DISSOLUTION BY JUDICIAL DECREE BECAUSE OF PARTNER'S MISCONDUCT. If one partner is guilty of serious misconduct the other partners have a right to a dissolution.

For misconduct of one member of the firm, the other partners have a right to have the firm dissolved. Such misconduct must be wilful and serious. For slight errors or lapses, the right would not exist.

Sec. 76. DISSOLUTION BY JUDICIAL DECREE BECAUSE OF FINANCIAL FAILURE OF THE ENTERPRISE. If the firm is operating at a loss and no relief is in sight a court of equity will decree a dissolution.

Where a firm is a financial failure and no relief is in sight, but it appears that it must go on losing money, any partner may compel the others to a dissolution, by filing his bill in equity and setting up such fact.

PART VI.

CHAPTER 15.

LIMITED PARTNERSHIPS.

Sec. 77. DEFINITION. A limited partnership is a partnership formed under some statute compliance with which entitles some of the partners known as special partners to have a limited liability both to the partnership and its creditors.

In some of the states statutes have been passed permitting the organization of partnerships, some of the members of which shall have only a limited liability, much after the manner of stockholders in a corporation. These statutes provide that there shall be one or more partners known as general partners who shall be fully liable for the firm debts, and special partners, who shall have no liability beyond the amount of their subscriptions.

The formation of such partnerships is not very extensive, as incorporation serves the purpose of limiting liability more effectually than these statutes, and also brings other advantages.

Sec. 78. REQUIREMENTS OF THE LAW IN FORMATION OF LIMITED PARTNERSHIPS. The law provides for the making a certificate, which must contain certain information and for advertisement.

Formation of a limited partnership is usually accomplished by filing with some officer, as the Secretary of State, a statement setting forth information which the law requires it to contain; and also by publishing in some newspaper a certain number of times, as set forth by the law. The law requires that the names of the partners be stated; that certain partners, therein named as general partners, shall have unlimited liability to creditors; that the extent of each special partner's interest shall be stated, that the name of the partnership shall be given, its objects set forth, its place of business stated, etc. Under some statutes the term "Limited," must be added to the firm name.

APPENDIX A.

FORMS IN PARTNERSHIP.

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FORMS IN PARTNERSHIP.

1. Articles of partnership.

ARTICLES OF PARTNERSHIP, entered into this .... day of ..... between ....., party of the first part, and ..... party of the second part.

1. The said parties have agreed, and by these Presents, do agree, to be co-partners under the firm name and style of ....., the said partnership to begin on the .... day of ..... and continue to and including the .... day of .....

2. The purpose of said partnership is to conduct a meat market in the City of Chicago. Until further agreed upon the said business shall be conducted at No. ..... street, in said city.

3. The said parties have contributed as capital the sum of Three Thousand Dollars, brought in by them equally, and said sum shall constitute the capital of the firm until further agreed upon.

4. The partners shall be entitled to the net profits of the business in equal shares, and all losses shall be borne equally. And all expenses including rents, clerical hire, depreciation of commodities, bad debts or otherwise shall be borne between said partners equally.

5. Each partner shall devote his entire time and attention to the firm business, and will do the utmost in his skill, ability and power for the joint interest, benefit and advantage of the firm, and neither partner will, during the continuance of the business carry on or be directly or indirectly interested or concerned in the same kind or

similar business, nor engage in any other business whatever without first obtaining in writing the assent of the other partner.

6. Each partner shall be entitled to draw out of the profits of the business twenty-five dollars per week.

7. Proper books of account shall be kept by said partners, such as are usually kept in any well managed concern of a similar nature and extent. And it shall be the duty of the party of the second part to keep said books, and he shall keep them faithfully and diligently. But if business warrants, the parties hereto anticipate the employment of a competent bookkeeper, as shall be mutually agreed upon.

8. At the closing of the books for each year each partner shall be advanced whatever is due him if there be any surplus. If he has during said year drawn more than his share he shall return the amount so overpaid him.

9. The fiscal year shall begin January 1st and end December 31st of each year.

10. The banking account of this partnership shall be kept in the ..... Bank. Checks shall be drawn upon said bank account only upon signature of both parties.

11. Neither party hereto shall sign or endorse any bond, bill of exchange, or promissory note, or accept any bill of exchange in the firm business except with the joint signature or consent of the other; unless the necessity of the case renders such joint signature or consent impossible.

12. Clerical help shall be employed only with the consent of both partners. Nor shall either partner discharge any help without the consent of the other.

13. At the end of the partnership, the said partners will make, each to the other, full and correct accountings of all things relating to their business and the assets and property thereupon shall be sold, the debts collected, and the proceeds applied as follows: first, in discharge of partnership debts; second, in necessary or agreed ex-

penses of liquidation, and lastly to the partners or their representatives or assigns, what may be due them according to their respective interests.

14. In case either partner shall upon the dissolution of the firm, either before or at the expiration of the term hereby agreed upon, be desirous of purchasing the share of the other partner, he shall have the right to do so at a price then to be agreed upon by giving notice to the other partner or his representative. If the partners or parties cannot agree upon a valuation, each shall appoint an arbitrator and the arbitrators so chosen shall appoint a third, who shall fix by majority vote the amount to be paid. In case either party refuses or neglects to choose an arbitrator within ten days after the notice above given, the arbitrator so chosen by the other shall proceed to fix the price and his valuation shall be considered conclusive. If both partners desire to purchase, that one shall be awarded the right who shall bid the higher sum.

15. The good will of said partnership shall be considered a firm asset upon dissolution, and no partner shall unless he purchases the business directly or indirectly carry on a meat market or be interested in the same as manager, agent, stockholder or otherwise, for five years next within a one mile radius from the place of location of said business at the time of dissolution.

16. In the event of the death of either partner prior to the term hereby agreed upon or any extension thereof, the surviving partner shall account to the representatives of the deceased partner and thereupon shall have the right to continue the business, under the said firm name or any other. And in that case the good will shall not be valued, but shall survive as an asset to the surviving partner.

In Witness Whereof, the said parties have hereunto affixed their hands and seals the day and year first above written.

..... (*Seal*)

..... (*Seal*)

2. Extension of term of partnership.

(*Note*: This extension agreement might be endorsed on the original articles or written on a separate paper attached to them.)

An agreement for extension of Partnership Articles, entered into by and between ..... party of the first part, and ..... party of the second part.

Whereas the Articles of Partnership entered into between the parties hereto, dated ..... will expire by their own limitation on the ..... day of ....., and the parties hereto desire to extend the term therein stated to, ... it is hereby mutually covenanted and agreed that the said partnership shall continue to said date, and the said Articles of Partnership shall be extended thereto and continue in force as though the said date ..... were in said original Articles of Partnership instead of said date ..... and the parties hereto agree to be bound upon the terms, conditions and covenants contained in said original agreement for said extended period as though originally they had been made for said period.

In Witness Whereof, etc. (concluding as in form 1).

3. Public notice of dissolution of firm.

Notice is hereby given that the partnership lately subsisting between ..... and ..... under the firm name and style of ..... was dissolved on the .... day of ....., and is no longer subsisting. (Debts owing to said firm should be paid to ..... who has full power to compromise, release and receipt for the same).

APPENDIX B.

QUESTIONS AND PROBLEMS.

APPENDIX B.

QUESTIONS AND PROBLEMS.

CHAPTER 1.

1. Define a partnership.

2. A, B, C and D, form a Society for Preservation of American Wild Animals. Is it a partnership? Might such a concern be incorporated?

3. A, B, and C desire to enter business together without incorporating. They mutually agree to own the business, but it is further agreed that if the venture fails, C shall be protected against loss. Does this provision prevent partnership?

4. What is the doctrine of delectus personae. Name some results that flow from it.

5. State some various ways in which a partnership differs from a corporation.

6. A employed B to conduct his grocery business as general manager, B to take 10 per cent of the gross receipts. The firm failed owing, among others, C. C sues A and B, as partners. Has B a liability? Why?

7. A loans B $10,000 to be used in B's business, A to have 5 per cent of the gross receipts and to be paid back at all events. No provision is made giving A any control of the business. Is A a partner?

8. A has a farm which he rents to B "on shares". Are the parties partners?

9. What is a partnership by estoppel?

10. What was the early test of a partnership as to third persons? What is the true test?

11. Explain to what extent partners are agents of each other.

12. Define "trading partnership"; "non-trading partnership".

13. A, B, C and D agree to form a partnership under the name of the A-B Company. B is to have no active interest in the firm; C is to take an active part; D is to remain unknown and also inactive. What kinds of partners are A, B, C and D, respectively?

CHAPTER 2.

14. Is any special form required for the creation of a partnership? What are articles of partnership? Are they recorded in any public office?

15. A and B entered into a partnership to operate a gambling house. B took in the money and refused to account. A brought a bill in equity for an accounting and a dissolution. Result?

CHAPTER 3.

16. Is a firm name necessary to a partnership? May a partnership choose a firm name which does not contain the names of the members of the firm or any of them?

17. A and B operated under the firm name of "Banner Grocery House". While this concern was in a prosperous, going condition, C and D organized a competing grocery concern and called it "The Banner Grocery Company". Have A and B any relief?

CHAPTER 4.

18. What is the firm "capital"?

19. A, B and C, partners, bought real estate with firm money. The deed was taken in A's name and no reference was made to B or C or the partnership. A dies and his heirs claim the land. Are B and C barred from asserting their interest? Suppose A has sold to D who had no

notice that B and C had an interest in the land, there being nothing of record, or otherwise, to put him on notice? A absconds with the money. Has D a good title?

CHAPTER 5.

20. What right has a partner in the management of the firm? Suppose there is a difference of opinion, can the majority govern?

CHAPTER 6.

21. State the general rule of conduct for a partner.

22. A and B, partners, owned a general store in a certain town. A, in the name of A and B, hired a horse from C for delivery purposes. He then turned the horse over to M who used it for several months. C sues A and B for the hire of the horse. B defends that he never made any benefit from the bargain, and never authorized or ratified it. Is the defense good? (Sweet v. Wood, 18 R. I. 386.)

23. A and B had a partnership for farming purposes. A borrowed money from C, ostensibly on account of the firm and for firm purposes, and gave a note in the firm's name for its repayment. B never really authorized the loan, or received any benefit from it, or ratified it. C attempts to hold A and B, as partners, under A's apparent authority to bind the firm. Can C have judgment against B? Why? (Ulery v. Ginrich, 57 Illinois, 531.)

24. When is a partner in a non-trading partnership liable on the negotiable paper made by his co-partner in the firm name and ostensibly for firm purposes?

25. A and B as partners carried on a dairy and milk business, owning some 50 cows for that purpose. A, without B's knowledge, sold the entire lot to C. B refused to allow C to take the cows and C brought replevin. Should C recover? Why? (Lowman v. Sheets, 124 Ind. 416.)

26. A and B were partners as grocers and C became indebted to the firm for goods purchased in the usual way of trade. He paid his bill to A, who absconded with this and other money. Is B bound by this settlement? State the apparent authority of one partner to bind another upon collections made, compromises, releases, etc.; the authority to borrow money, to make warranties, to employ agents, etc.

27. State the rule in reference to the ratification of a partner's unauthorized acts.

CHAPTER 8.

28. Is a partner liable for the torts of his co-partner? State the general rule.

29. A and B, partners, hired a horse from C, for the use of the partnership. A in driving the horse by his negligence injured it. Is B liable? (Witcher v. Brewer, 49 Ala. 119.)

30. A and B were partners in the ownership of a mine. By A's negligence in not keeping the shaft of the mine in a safe condition, C, an employee, was injured. Is B liable? (Mellors v. Shaw, 1 Best & S. 437.)

31. A and B were partners selling linseed meal. One of the partners sold some linseed to C and fraudulently mixed therein some teel-seed, which was inferior and cheaper than linseed. The other partner knew nothing of this. Is he liable? (Locke v. Stearns, 1 Metc. 560.)

CHAPTER 9.

32. A and B are partners. They have an established business with assets and liabilities. They admit C into the firm. D is at that time an existing creditor. Does C by his entrance into the firm become liable to D?

33. A, B and C are partners. C retires from the firm and is paid $2,000 for his interest, A and B to pay all the debts of the firm. At this time, D is a creditor of

the firm of A, B and C. After C's retirement D brings suit against A, B and C, co-partners, trading as, etc. Can C escape liability by pleading his retirement and the assumption of the firm debts by B and C? Why?

34. A, B and C are partners. C retires. What must he do to insure himself against future liability as a member of that firm?

35. Suppose in the above case C is a secret partner. What is his liability?

CHAPTER 10.

36. Are partners jointly or severally liable? That is, may you sue one partner alone, or must they all be joined? How may it happen that one partner may be compelled to pay all of a contract debt?

CHAPTER 11.

37. C is a general creditor of A and B, partners. Has A any lien of any sort on the property of A and B? How may he obtain such a lien?

38. If a creditor of a partnership has a judgment against the members of the firm, may he satisfy his judgment against the property of any individual member?

39. If C has a judgment against A, who happens to be a partner in the firm of A and B, can C levy on the partnership assets?

40. State the rule of the bankruptcy Courts as to the division of property of partners and partnerships among individual creditors and firm creditors.

CHAPTER 12.

41. Name the various ways in which a partnership may be dissolved.

42. What is the duty of each partner upon dissolution?

43. A and B decide to wind up their partnership business. A originally contributed $5,000. B contributed $3,000 and his experience and skill. The firm has $10,000 for division after debts are paid. State how it shall be divided between A and B.

CHAPTER 13.

44. What effect upon the firm does the death of a partner have?

45. To whom do the assets of the partnership belong upon the death of a partner?

46. What rights has the executor or administrator?

47. State a firm creditor's right against the estate of a deceased partner.

CHAPTER 14.

48. State the various reasons for which a court of equity will wind up a partnership at the suit of one of the partners.

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